SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. _____

A. L. BROWN,
Petitioner,

versus

GENERAL MOTORS CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 355 F. 2d 814.

GROUNDS OF JURISDICTION OF THIS COURT:

This case was decided by the Court of Appeals for the Fourth Circuit in opinions and Judgment filed January 13, 1966 (Record Vol. III pp. 38, 61). On February 7, 1966, an extension of time to file Petition for Rehearing was granted to and including February 24, 1966 (Record Vol. III, p. 65). Petition for rehearing was filed February 22, 1966 (Record Vol. III pp. 66-7) and was denied by Order filed March 11, 1966 (Record Vol. III, pp. 86-7). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari under Title 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED:

This was a products liability case for personal injuries caused by a crawler tractor (bulldozer) which started in gear and crushed the Petitioner's pelvis and legs. Action was founded on negligence and breach of warranty. Questions presented for review are:

(1) Did not the Court of Appeals (in a split decision) deny to Petitioner (plaintiff) the right of trial by jury to which he is entitled under the Seventh Amendment to the Constitution of the United States by reversing judgment for petitioner and directing entry of judgment for Respondent General Motors Corporation upon a construction of the facts by the Court of Appeals which is contrary to the evidence and disputed by the record?

(2) Did not the Court of Appeals thereby fail to observe the proper division of functions between judge and jury?

(3) Did not the Court of Appeals fail to apply state substantive laws as required in a diversity case?

CONSTITUTIONAL PROVISION INVOLVED:

Constitution of the United States, Amendment Seven:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE:

This was a civil action for personal injuries. Gomplaint was filed in the United States District Court for the Middle District of North Carolina, based on diversity of citizenship

and requisite amount in controversy. 28 U.S.C. Sec. 1332. Plaintiff, A. L. Brown (Petitioner) is a citizen of North Carolina and General Motors is a Delaware corporation with its principal place of business in a state other than North Carolina. The amount in controversy exceeds Ten Thousand Dollars, exclusive of interest and costs. (Record Vol I, pp. 288, 293).*

Defendant, General Motors Corporation appealed to the Court of Appeals for the Fourth Circuit from a judgment of the District Court holding it liable for personal injury to the plaintiff resulting from the accidental starting in gear of a bulldozer which General Motors expressly claimed was so designed that the starter would not function in gear.

The case was submitted to the jury on special interrogatories as to negligence, contributory negligence, warranty, damages and concurring negligence of Brown's employer. The jury absolved General Motors of negligence but found a breach of warranty. Because of misconduct of certain jurors and conflict among the answers to the interrogatories on negligence, the Trial Court set aside the portions of the verdict relating to negligence (Record Vol. I, p. 305) and entered final judgment for $140,000 on the warranty finding. (Record Vol. I, p. 306) (Binding instructions had been given to the jury on the warranty issue.)

---

* Record references herein are to the appendix record.

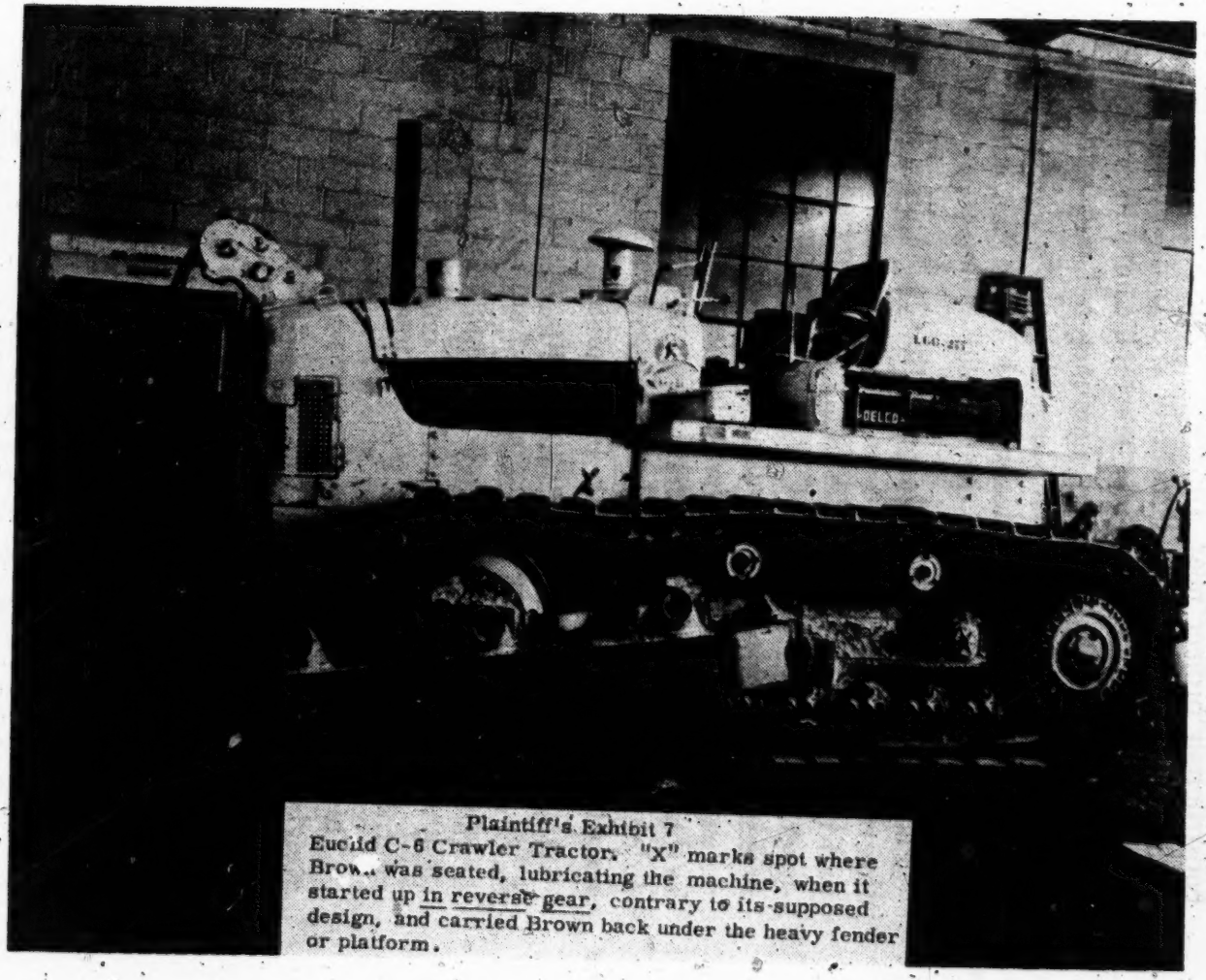
The Trial Court also directed that the plaintiff be allowed a new trial on the negligence issues in the event that the judgment entered on the warranty finding was reversed on appeal. (Record Vol. I, pp. 305-6).

The Court of Appeals has reversed the Trial Court and ordered entry of judgment for General Motors on all issues. It concluded (Judge Bell dissenting) that no case was made for the jury on any theory.

It is necessary to state the facts in order to present the questions which arise.

Facts:

On the following page we reprint Plaintiff's Exhibit 7, a picture of this bulldozer, showing where plaintiff was seated when he was caught and crushed by the starting of the tractor in gear:



Plaintiff's Exhibit 7
Euclid C-6 Crawler Tractor. "X" marks spot where Brown was seated, lubricating the machine, when it started up in reverse gear, contrary to its supposed design, and carried Brown back under the heavy fender or platform.

On November 10, 1950, while working on a highway construction project near Anderson, South Carolina, the plaintiff, A. L. Brown was severely and permanently injured by a "Euclid C-6 Crawler Tractor", commonly called a bulldozer, which had been manufactured and sold by General Motors Corporation. General Motors makes and sells a large amount of heavy earth moving and construction equipment under the "Euclid" name.

Plaintiff offered evidence to prove that his injuries were the result of negligence and breach of warranty on the part of General Motors in designing and building a bulldozer which was capable of being *inadvertently started in gear,* contrary to long-standing custom and practice of defendant in the heavy equipment industry and contrary to the claims made by the defendant for this very machine, a defect known to General Motors but as to which it gave no warning.

Brown was a mechanic of brief and limited experience, employed by Charlotte Equipment Company, and engaged at the time in servicing heavy road-building equipment used on the job by Blythe Brothers Company, the prime contractor. (Record Vol. I, p. 9 et seq.)

This bulldozer was one of the pieces of equipment. It weighed about 40,000 pounds (Record Vol. 1, p. 57), stood half again higher than a man's head, was driven by a diesel engine and had an automatic transmission. (Pl. Ex. 5, Euclid Maintenance Manual; see picture reprinted supra). It was nearly new, having been in use something over two months, and was operating normally (i. e. in accordance with its design) according to all the evidence. (Record Vol. I, pp. 215-16, 226, 111, 142)

In an *Operator's Handbook* published by the defendant for this machine and delivered with it (Interog. 16, Record

Vol. I, p. 5; Vol. II, p. 53), defendant made the claim that the starter would not operate unless the range selector (i.e. gear lever) was in neutral, (Pl. Ex. 4 p. 11; Record Vol. I, p. 7):

> "A micro switch or a mechanical block on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral."

Again on page 8 the same *Handbook* says:

> "The lever MUST be in neutral in order to start the engine."

It is established moreover, and uncontradicted, that it was customary for all Euclid earth-moving equipment which had an *automatic transmission* to be designed also with a *safety device in the starter system* to prevent inadvertent or unintentional starting in gear, and General Motors had invariably followed this custom so far as testimony in this case shows. (Record Vol. I, pp. 143-4, 116-17, 162-3, 75-78) Nor is this surprising to anyone familiar with the operation of the modern automobile. Cars with a conventional dry clutch ordinarily do not have a neutral starter. None is necessary because when the starter is operated the car will immediately lurch forward or backward if it is in gear, and the load on the engine prevents it from starting. In cars with an automatic transmission, it is a different matter, the built-in slippage of the transmission permits the engine to be started in gear *unless some device prevents the starter from operating except in neutral.*

This is all the more true and critical in Euclid heavy construction machines because of their great size and weight, exposed tracks, highly responsive diesel engines

(especially when hot) and the fact that these machines are designed without the protection of a switch key. (The machine which injured Brown had no switch key at the time. Record Vol. I, p. 170.)

In past years, safety had been provided by General Motors on such machines through an electrical micro switch in the starter system, which interrupted the starter circuit except when the machine was in neutral. (Pl. Ex. 14, Operator's Handbook dated 8-59; Record Vol. I, pp. 143-4, 116-117, 162-3, 75-8). This was precisely the arrangement on the Euclid C-6 Crawler Tractors manufactured by the defendant up until shortly before the machine in question was built. And on these older machines General Motors also made the claim that the starter would not operate in gear. See Pl. Ex. 14, the Operator's Handbook for the older machines p. 11; Record Vol. 1, p. 196-8:

> "A micro switch on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral."

Note that this is virtually the same language as the claim made for the later machine which injured the plaintiff. The defendant simply carried this claim forward in its publications, although the design of the starter was greatly altered.

The micro switch performed its function well as a safety device. There was no evidence of anyone having been hurt by a machine starting in gear where this device was in use.

Any such safety device can be *circumvented deliberately* by someone who knows how, but the micro switch could not be accidentally by-passed. To do so required the use of both hands in a manner adapted to that purpose and no other; there could be no mistake about it. (Record Vol.

I, pp. 223-4). However, General Motors saw fit in July, 1960 (Interog. 20, Record Vol. I, pp. 194-5) to discontinue the micro switch and to change over to a design which it considered more "rugged", (Record Vol. I, p. 236) but which Petitioner contended was far less safe, consisting of a moving shield molded onto the range selector lever (gear lever) with the starter button mounted on a bracket just below the shield. (See photographs hereafter reprinted.) This arrangement was intended to expose the starter button below the lip of the shield only when the range selector lever was pushed away from the operator into neutral position, and this is the way it appeared to one sitting in the operator's seat. (Record Vol. I, pp. 59, 208, see photos hereafter printed). But this was an illusion. In fact, although the starter button was *visible* to an operator only in neutral, looking down from his high seat, and was hidden from view by the shield in any gear, the button was actually still exposed in first gear to one who reached for it with his thumb or finger (as defendant's witness admitted, Record Vol. I, pp. 207, 208, see pp. 62-3). Indeed as subsequent examination of the machine showed, the shield was so loosely fitted that the button could still be reached even in second and third gear. (See Record Vol. I, pp. 226, 192) The shield operated only as a "reminder" and in first gear petitioner proved it was no obstacle at all. (Record Vol. I, pp. 62-3, 207, 208)

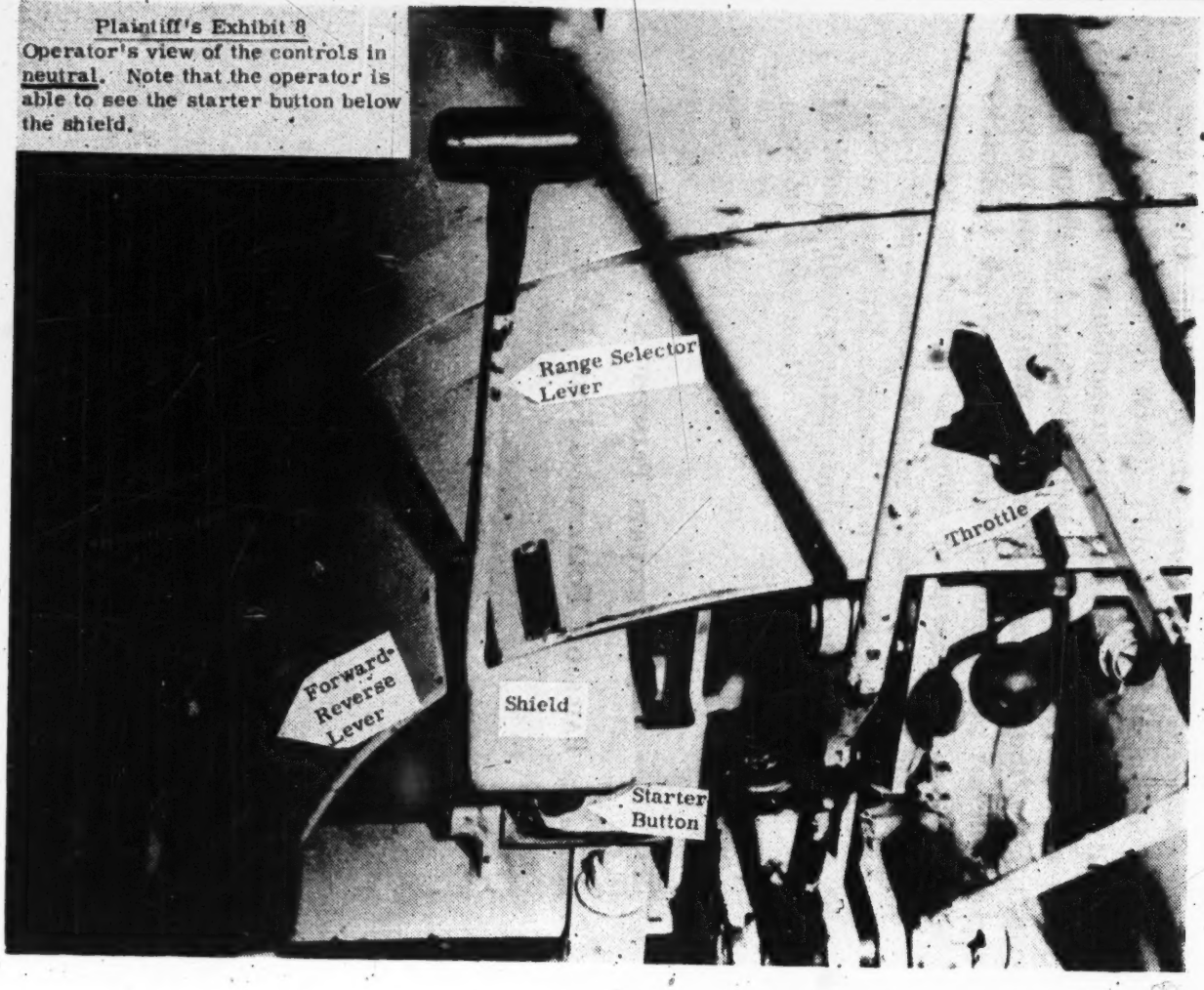
This is best shown by photographs which were introduced as exhibits at the trial and are reprinted on the following pages. Plaintiff's exhibits 8 and 9 show the starter button and shield as viewed from the operator's seat. They show that the starter button was *visible* to the operator only with the Range Selector lever in neutral and was hidden from view by the shield when the lever was pulled into first gear. The next two photographs, Exhibits 11 and

12, were taken from a level *horizontal* to the starter button and shield and below the level of the operator's seat (Record Vol. I, pp. 66-69). This is a level from which this mechanism would not normally have been observed before the accident happened. These pictures show *what the eye would not see* from any normal position but what the thumb of the operator would encounter on reaching for the button. Exhibit 11 shows the machine in neutral with the button exposed. Exhibit 12 shows that in first gear *the button was still exposed* and could readily be pushed (although the operator could no longer see it from his position in the seat):

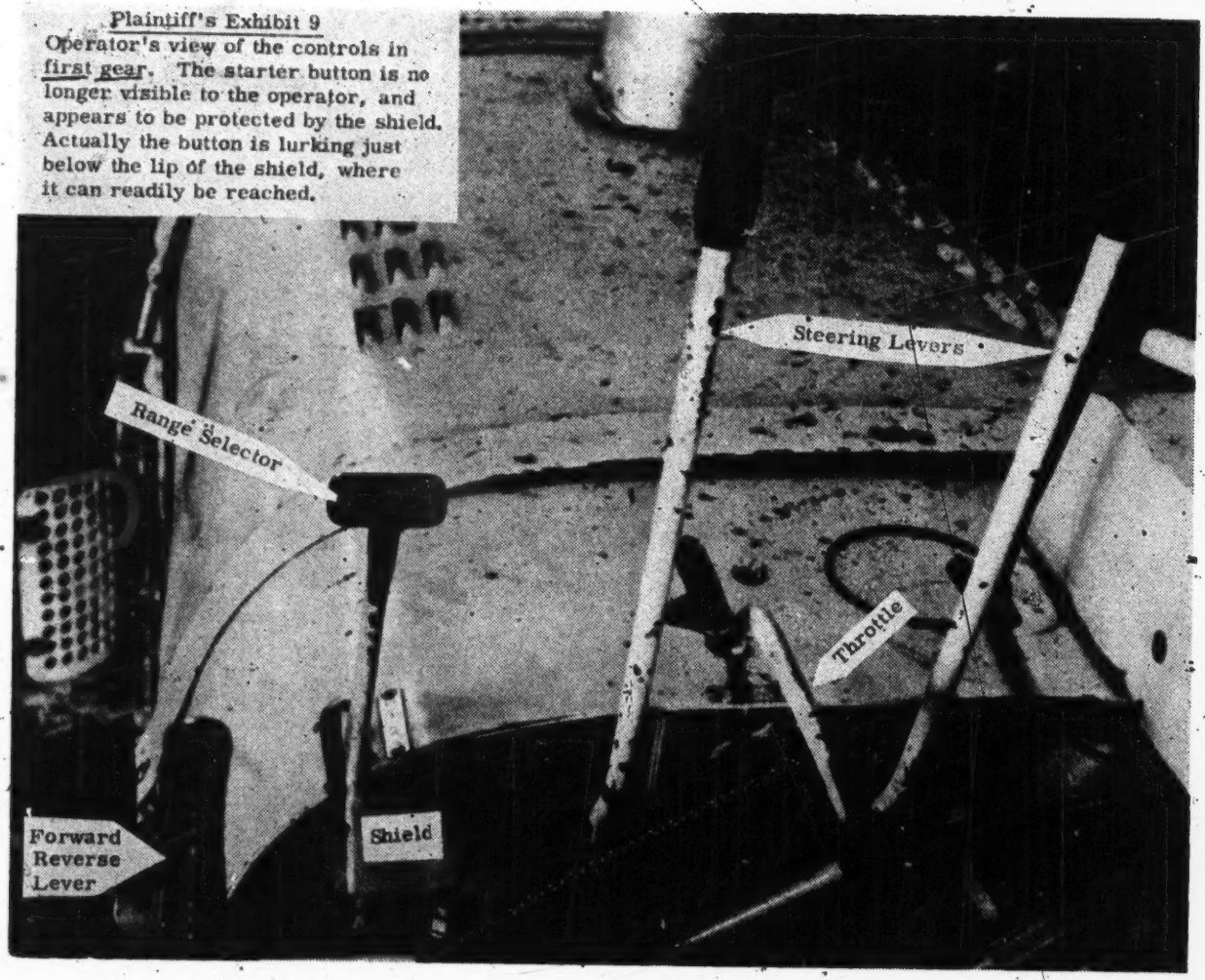
See Pictures Printed in

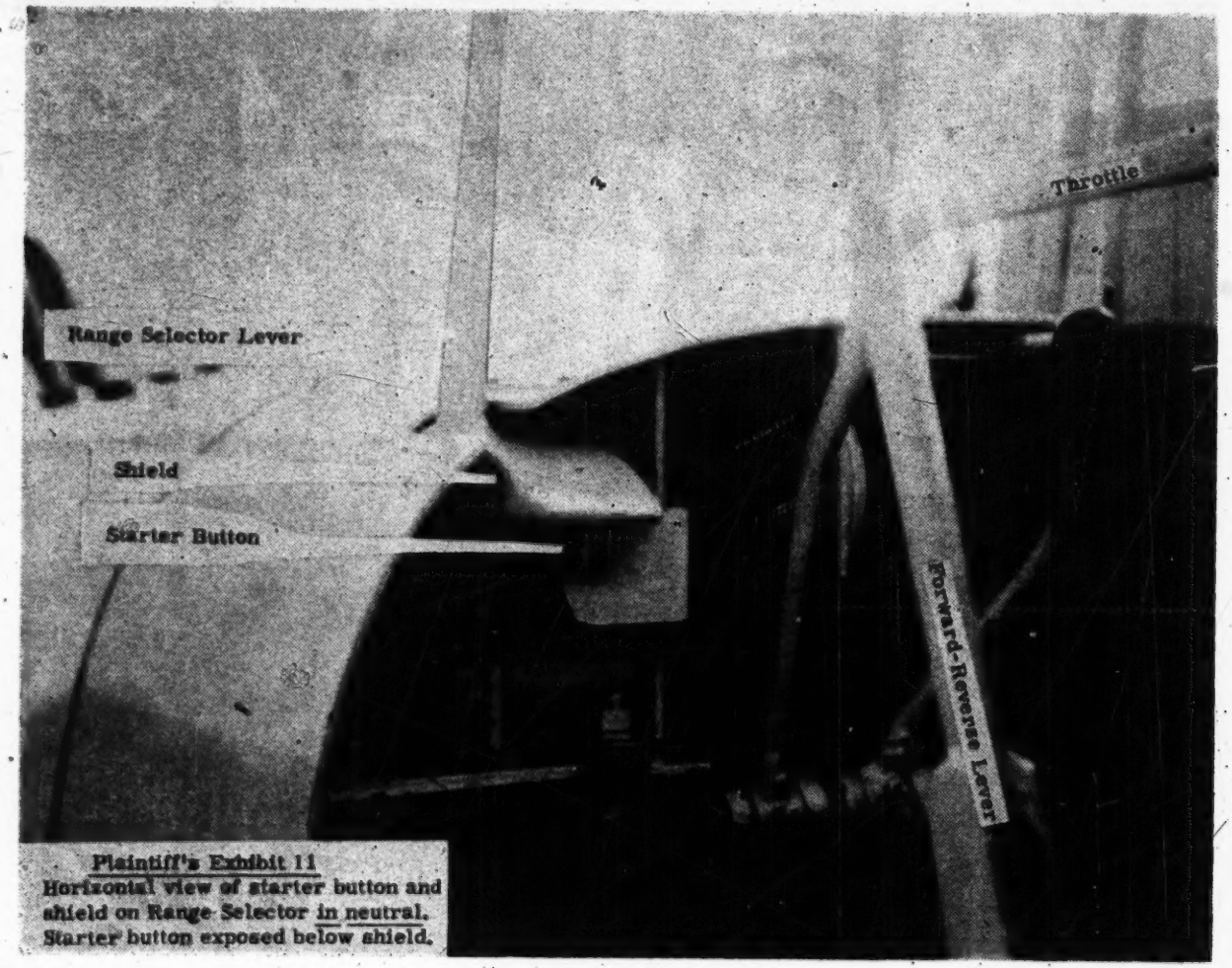
Pairs on Following Four Pages.

Plaintiff's Exhibit 8
Operator's view of the controls in neutral. Note that the operator is able to see the starter button below the shield.

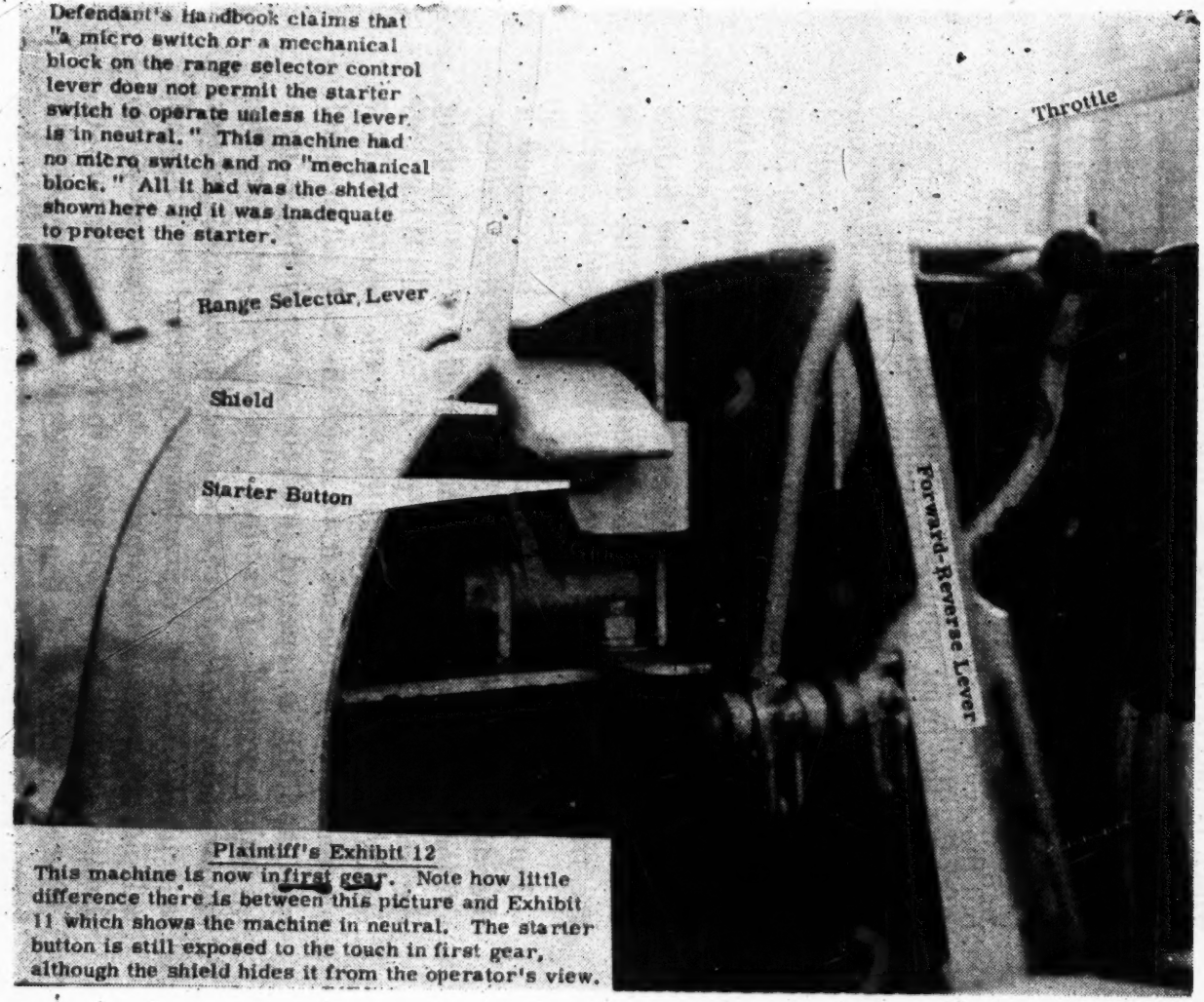


Plaintiff's Exhibit 9
Operator's view of the controls in first gear. The starter button is no longer visible to the operator, and appears to be protected by the shield. Actually the button is lurking just below the lip of the shield, where it can readily be reached.





Plaintiff's Exhibit 11
Horizontal view of starter button and shield on Range Selector in neutral. Starter button exposed below shield.


Defendant's Handbook claims that "a micro switch or a mechanical block on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral." This machine had no micro switch and no "mechanical block." All it had was the shield shown here and it was inadequate to protect the starter.
Range Selector Lever
Shield
Starter Button
Throttle
Forward-Reverse Lever

Plaintiff's Exhibit 12

This machine is now in first gear. Note how little difference there is between this picture and Exhibit 11 which shows the machine in neutral. The starter button is still exposed to the touch in first gear, although the shield hides it from the operator's view.

This tractor has a drive shaft (also called a "drive line") which connects the engine in front with the transmission in the rear, and two universal joints in this drive shaft are required by instructions from General Motors to be greased every 100 hours of operation. (Operator's Handbook, Pl. Ex. 4, p. 34) General Motors gave no instructions on how to get at these joints for greasing (Record Vol. I, p. 223), but the evidence shows that a customary and usual way of reaching the front joint is to sit on the top of the track and reach under the hood and down behind the engine. (Record Vol. I, p. 71, 73) Defendant's own witness confirmed this. (Record Vol. I, p. 209) Witness Gulley testified that the rear universal joint could also be reached from the same position. (Record Vol. I, p. 71, 73) The alternative is to take up the floorboard of the machine, since General Motors provided no convenient access, and the fittings cannot be reached from below because of a belly pan on the tractor.

Furthermore the grease fittings can only be reached if the drive shaft is rotated to place the fittings on top. Customarily this rotation is accomplished by "bumping the starter." (Record Vol. I, pp. 73, 210-12) What this means is that the mechanic touches the starter button momentarily and releases it, to rotate the shaft a fractional turn, and this is repeated until the grease fitting is in a favorable position. *This does not involve starting the engine or moving the tractor* because the drive shaft rotates in neutral. (A diesel engine has no electrical ignition and will not start when the starter is turned over unless the throttle is on.) We emphasize that this procedure of "bumping the starter" is a commonplace procedure with heavy diesel engines, regularly followed by mechanics for this and other purposes, whenever the engine or drive line needs to be turned for servicing or repair. (Record Vol. I,

p. 210-12) *Defendant's own witness confirmed this,* an employee of the Euclid dealer in Charlotte, North Carolina. (Record Vol. I, pp. 210-12)

The accident happened on a November night about 8:00 p.m. The plaintiff, Brown and Robert Gulley, another employee, were greasing and servicing the equipment to have it ready for the next day. Gulley was the regular grease man and Brown was helping him. Brown is now unable to recall the details of the accident but Gulley testified about it. (Record Vol. I, p. 54 et seq., 69)

They came to the Euclid C-6 Tractor and prepared to grease the universal joints. Brown seated himself in the usual position on top of the track, as shown on the photograph, (Pl. Ex. 7) above. He was using a light on a drop cord to look for the grease fittings, while Gulley was up in the driver's seat, where he could reach the starter button, although he could not see the button because of darkness. (Record Vol. I, p. 54 et seq.).

Gulley "bumped" the starter in order to rotate the drive shaft, whereupon the machine started in reverse gear, contrary to its supposed design, and carried Brown back and under the massive fender of the tractor. (Record Vol. I, p. 54 et seq., 68).

General Motors contended that this accident could not have happened if the machine had not been left in gear with the brakes off and the throttle on and the forward-reverse lever in reverse before Mr. Gulley pressed the starter button. *We agree, and this is the very set of circumstances which the safety starter system was intended to protect against.* As the evidence shows, the throttle on this machine was so mounted that it was subject to being knocked into the "on" position by a dismounting operator (Record Vol. I, pp. 115, 138-9); it had no safety latch to

keep it in the off position (Record Vol. I, pp. 115, 138-9). The same was true of the forward-reverse lever (Record Vol. I, p. 114); and brakes were usually left "off" when parking on level ground (Record Vol. I, p. 118). Thus the safety starter system was the only real protection afforded on this tractor. The concurrence of all this set of circumstances was *foreseen* by General Motors when it designed a safety starter and was the very reason for having a safety starter.

Upon these facts (and further details to be referred to in the argument below) Brown contends that a case was made for the jury on both negligence and warranty.

ARGUMENT

The Opinion and Judgment of the Court of Appeals denies to Petitioner his right to a jury trial

In directing judgment for General Motors, the Court of Appeals has undertaken to resolve disputed issues of fact and has thereby deprived the plaintiff Brown of his right to a jury trial as guaranteed by the Seventh Amendment and decisions of this Court. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780; *Byrd v. Blue Ridge Rural Elect. Coop.*, 356 U.S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893; *Dicks v. New York Life Insurance Co.*, 359 U.S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921.

Judge Bell, who dissented from the Opinion of the Court of Appeals was emphatically of the view that the issues were for the jury. See, e.g., opinion hereto appended, p. 14:

> "I would affirm the judgment because I think the record offers more than enough evidence to support the jury's finding of breach of warranty by the de-

> fendant. At the very least I agree with the trial judge that the plaintiff is entitled on this record to have his claim of negligence submitted to a jury."

Again on pp. 16-17:

> "We think the majority usurped the function of the jury when it concluded that the shield was, to the ordinary observer, an obvious substitute for the micro switch which was removed without warning."

This case was tried under South Carolina substantive law as to negligence and under Ohio substantive law as to liability arising from manufacture and sale of the tractor in Ohio by General Motors, this being the law to which the state courts of the forum (North Carolina) would resort.

South Carolina follows the rule of *MacPherson v. Buick Motor Car* Company, 217 N.Y. 382, 111 N.E. 1050 as it has evolved and is now embodied in Restatement of Torts (2d) Sec. 395:

> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied."

See *Salladin v. Tellis*, _____ S. C. _____, 146 S.E. 2d 875; *Beasley v. Ford Motor Co.*, 237 S. C. 506, 117 S. E. 2d 863; *Odom v. Ford Motor Co.*, 230 S. C. 320, 95 S. E. 2d 601.

Ohio has recognized liability of a manufacturer on express warranty adressed to a remote user. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N. E. 2d 612 (1958); *DiVello v. Gardner Machine Co.*, 46 O. O. 161, 102 N. E. 2d 289 (Com. Pls. 1961); *Lewis v. VinDevers Mercury, Inc. and Ford Motor Company*, 173 N. E. 2d 145 (Ohio App. 1959). Recently also the principle of implied warranty or strict liability has been recognized in extending protection to the employee of a remote purchaser or user, such liability resting upon the implied representation made by a manufacturer in placing goods in the channels of commerce. *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N. E. 2d 92 (1965); see also *Markovich v. McKesson and Robbins*, 106 Ohio App. 265, 149 N. E. 2d 181.

The majority opinion of the Court of Appeals rests upon several supposed facts which are clearly disputed in this record.

The majority opinion assumes and insists that the tractor was being used in a manner not intended by the manufacturer and therefore not to be anticipated. It is said (Opinion pp. 12-13):

> "When Gulley 'bumped' the engine, as Brown directed, he was groping in the dark. He depended exclusively upon his feel for the instruments in order to turn the shaft. He cannot say whether he felt under the shield or just how he reached the starter."
>
> * * *
>
> "Certainly the manufacturer did not warrant the safety of the machine against a blind operation of it; nor was it reasonably foreseeable that

the machine would be activated by one fumbling in the dark."

But these are not the facts. It is true that the starter button was not lighted as Gulley reached for it, but Gulley testified (as we shall amplify later) that he did *not* reach beneath the shield. (Record Vol. I, pp. 69-70) This tractor was definitely intended for operation at night and this record shows it. General Motors delivered it equipped with both headlights and back up lights (see defendant's invoice, Tr. Vol. I, p. 321). These were on the machine at the time of the accident. (Tr. Vol. I, p. 162). It also had a lighted instrument panel up in front of the operator (Tr. Vol. I, p. 173); but there was no illumination down where the starter button was located. Certainly the operator had to be able to activate the starter during darkness by touch and feel, and the same with the other controls, in order to operate this machine at night. Road construction projects are usually in rural areas; frequently they operate at night. If they do not, the machines must be serviced at night in order to take advantage of daylight in the winter time. There are no lighted shops nearby to take the equipment into. General Motors was not ignorant of these facts and did not claim to be. It equipped the tractor for night operation. Nor is it uncommon at all, that one should operate a starter by feel. Virtually all of the automobile starters with which the writer is familiar are operated at night by feel and are not lighted.

It is undisputed that the manner in which this machine was being serviced was a usual and customary one. General Motors in its manual ordered this greasing to be done but gave no instructions as to how to go about it. G. M.'s own District Service Representative agreed that this was so. (Tr. Vol. I, pp. 232-3) Another witness for

defendant confirmed that the very procedure used by Gulley and Brown is the way it is usually done (Tr. Vol. I, pp. 209, 211-12). Turning the engine by means of "bumping" the starter is a technique used as well in other service and repair operations such as adjusting valves, as defendant's witness testified (Tr. Vol. I, pp. 210-12). Certainly this is a use which General Motors knew about and expected, and the jury was entitled to find it a proper use.

There was no intent to start this engine, as the Opinion assumes on p. 5. Diesel engines have no electrical ignition. They are not turned off with a switch but by shutting down the throttle completely. With the throttle shut down the engine can be turned over indefinitely without starting it. (Tr. Vol. I, pp. 203-4). But because a throttle may be faulty or may be inadvertently opened it becomes doubly important to have the starter operate *only with the tractor out of gear.*

The Opinion of the Court of Appeals also assumes contrary to the evidence, that Mr. Gulley, in order to press the starter button had to squeeze his thumb or finger into a confined space under the shield. The Opinion, p. 4 states:

> "However, the button was accessible to an operator, though not without difficulty, if he reached his thumb up behind the shield and into the space – measured as ⅛ or ¼ inch – between the shield and the button, as Gulley must have done."

Again on pp. 12-13 the Opinion states:

> "Concededly, if the engine was in gear, he could touch the starter only by squeezing his thumb or finger between the shield and the button, contrary to the design of both."

Again, this is not the fact and no such thing was ever conceded. The foregoing embody contentions made by the defendant but they are *disputed by plaintiff and are not borne out by this record.* The record *shows the contrary:*

First of all, the photographic exhibits reproduced herein, exhibits 11 and 12 show that the position of the shield was only slightly different in neutral than in first gear. Between neutral and first gear, the shield has moved enough to cover only the upper half or less than half of the starter button (and it is a large button). The lower half of the button is still entirely exposed and this is more than ample to be pressed by the operator. He can press the button without even touching the shield, let alone squeezing his thumb or finger beneath it. *This is the fact.* The other evidence is not to the contrary. The measurements referred to by the Court of Appeals was taken beneath the shield between the shield and the upper part of the starter button, but there was no need to reach into this space to press the button.

Secondly, Mr. Gulley had testified that on the occasion of the accident he reached for the starter button with his thumb, reaching forward in a horizontal direction from a level below the level of the seat, and that in pressing the button *nothing got in his way* "as far as being obstructed or having to get down underneath, anything like that." (Record Vol. I, pp. 69-70).

Thirdly, the Trial Judge and jury witnessed an actual demonstration on this tractor itself when Mr. Gulley showed how readily the button could be pressed in first gear. (Record Vol. I, pp. 138-9, see also 69-70) There was no claim by the defendant at the time that Mr. Gulley had to *squeeze* his thumb into any confined space to do this. Defense counsel contented themselves with showing

merely that Gulley's thumb had come in "contact" with the range selector (Record Vol. I, p. 139). This meant only that Gulley had touched or brushed the lower lip of the shield. As the pictures show, this could readily (but not necessarily) occur. This does not mean that the shield furnished any obstacle whatever to pressing the starter button. The Judge and jury saw that it did not; Gulley had testified that it did not (Record Vol. I, pp. 69-70); and counsel for defendant did not contend otherwise at the time of the demonstration (See Record Vol. I, pp. 138-39).

The Court of Appeals, in directing judgment for General Motors, has adopted a construction of the facts contrary to all this evidence and contrary to what the Trial Judge saw and acted upon when he allowed this case to go to the jury. Surely this is a case where the Trial Judge's observations are entitled to weight. He saw the actual machine which did the harm and saw the process demonstrated.

It is said that the "centerpiece" or "premise" of Brown's claim is the change in the mechanism of the tractor from micro switch to shield. (Opinion pp. 3, 5) We agree this fact was very significant in assessing the conduct of General Motors, but the case cannot be so narrowly appraised. The history of micro switch machines, which operators had come to rely upon, was important because it rendered the operator more susceptible to being misled by an unsafe design and because it showed a custom and an existing technology which would produce a safe starter, but it cannot be viewed as plaintiff's whole case. To do so overlooks the failure of General Motors to warn of danger which it knew existed, which we discuss later. It also overlooks the basic weakness of the design of this shield device itself.

We have pointed to the evidence that the shield only half covered the starter button in first gear and that this machine was indeed designed and expected to be operated during darkness. We ask the Court in referring to the four photographs of the controls reproduced herein to consider further the dangerous illusion created by this arrangement. The operator from his high perch in the driver's seat becomes accustomed during daylight to seeing *and reaching* the starter button just below the lip of the shield with the gear in neutral. (Exhibit 8) *The shield becomes a reference for finding the button.* When the lever is pulled into first gear the button disappears from view (P. Ex. 9) and he assumes that he can no longer touch the button. This is exactly what General Motors claimed; the Court of Appeals rightly assumed that this is its only purpose (Opinion p. 10) *and so does the operator.* But the other two photographs (Pl. Ex. 11 and 12), show how little difference there *actually* is between the position of the shield in neutral and in first gear, so far as protecting the button is concerned. An operator reaching for this button in the dark would still find it just *below the lip of the shield (not beneath it but below it). A man feeling in the dark would never know the difference.* He would assume the machine was in neutral if he found the button exposed. If he touched the shield he would expect to find the starter button just below it; and so it is, even in first gear, waiting to be pushed. *This is the illusion and trap created by General Motors.* And this would be so even if there had been no history of a micro switch. It becomes all the more a trap in view of the history of a safe starter system on machines formerly sold by this defendant and which Gulley was accustomed to operating.

The Court of Appeals has entirely misconstrued the facts and Brown's position when it says: "No contention is made

that the shield was badly constructed, contained intrinsic flaws or was of defective design." (Opinion p. 8) This Petitioner has constantly attacked the *design* of this starter system in the Trial Court where this evidence was presented, and in his brief to the Court of Appeals. Is this a reasonably safe device when it creates an illusion of safety which it does not provide? Surely a Court cannot say it is a matter of law. As we have shown, this starter did not measure up to the claims which General Motors made for it:

> "A micro switch or a mechanical block on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral." (Operator's Handbook, p. 11).

Defendant's own district manager admitted that the starter designed for this machine did not satisfy this claim. (Record Vol. I, pp. 230-31). Whether this language is treated as creating an *express warranty* or not, it is at least evidence of a standard of design adopted and announced by the defendant itself and admissible for that purpose. See *Wilson v. Hardware, Inc.*, 259 N. C. 660, 131 S. E. 2d 501 (1963). We think it is also evidence of the scope of the warranty to be implied under Ohio law of strict liability.

Failure to Warn: The evidence shows that the General Motors District Service Representative for Virginia and North Carolina, whose duties included the investigation of questions of safety, *already knew before this accident* that this model tractor could be started in gear by touching the starter button below the shield. (Record Vol. I, p. 226) Yet neither he nor General Motors issued any warning to customers who had previously bought this type tractor. This Representative of General Motors testified:

> "I only told it to my dealers, I did not tell it to any of our customers having that particular type of gear."

(Record Vol. I, p. 227) It is apparent that General Motors here followed the policy prevailing in the automotive industry and recently reported in Congressional hearings:

> "Time and again unsafe cars were delivered to unsuspecting customers. And when car defects were discovered, the car owners were not notified — only the dealers who were cautioned not to disclose faulty design or construction but to repair it under guise of 'product improvement' whenever the customer could be located." (Testimony of Walter Ruther as reported by Associated Press May 10, 1966)

Why, if this was not a hazardous device, did the District Service Manager caution his dealers? And having told the dealers, why was not the warning carried to users of the machine? This policy afforded no protection to the plaintiff in the present case. Surely a jury was entitled to find that General Motors was guilty of negligent failure to warn this plaintiff and others like him.

The Court of Appeals failed to observe and apply the State law of South Carolina and Ohio

The Court of Appeals has conceded that the question of negligence depends upon South Carolina law. (Opinion p. 6) Yet nowhere in the opinion is South Carolina Law cited or applied as required by the decisions of this Court. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817. Instead the opinion cites cases at random from numerous jurisdictions, as for instance in its conclusion that a tractor that will start in gear is not per se a dangerous instrumentality. (Opinion p. 10)

South Carolina follows the rule originated in *MacPherson v. Buick Motor Car Company,* 217 N. Y. 382, 111 N. E. 1050. Surely if Judge Cardozo was willing to regard an automobile with a defective wheel as dangerous, a 40,000 pound tractor which is capable of *accidental* starting in gear *yet appears and purports to be otherwise* would be regarded under South Carolina law as creating an unreasonable risk of harm, and a jury could so find.

The decision is likewise contrary to the law of Ohio on warranty and strict liability, as evidenced by the decisions cited herein p. 20.

Petitioner respectfully moves that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review the decision, judgment and order of the Court of Appeals.

Wm. Clarence Kluttz

Lewis P. Hamlin, Jr.

Lewis P. Hamlin, Jr.

Wachovia Bank Building

P. O. Box 58

Salisbury, North Carolina 28144

Attorneys for Petitioner

Telephone 636-8800

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9925.

A. L. Brown,
Appellee,

versus

General Motors Corporation,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT SALISBURY. JOHNSON J. HAYES, DISTRICT JUDGE.

(Argued June 2, 1965. Decided January 13, 1966.)

Before BRYAN and BELL, Circuit Judges, and BARKSDALE, District Judge.

James B. McMillan and Bynum M. Hunter for Appellant, and Lewis P. Hamlin, Jr., (Clarence Kluttz on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

Damages for personal injuries resulting from breach of warranty in the manufacture and sale of a crawler tractor, familiarly known as a bulldozer, were adjudged in the District Court against General Motors Corporation. The plaintiff, Alexander L. Brown, had declared against G.M. in two counts, one in warranty and the other in negligence. In answer to specific interrogatories, the jury found no negligence and no contributory negligence but did find a breach of warranty. Because of misconduct of certain jurors and a conflict in an answer to another interrogatory, the Court set aside the verdict in respect to primary and contributory negligence but entered a final judgment on the warranty finding. G.M. appeals.

In our view the evidence was insufficient in law to establish liability either on warranty or in negligence. We reverse, and order entry of judgment for the defendant on its motion for a directed verdict at the conclusion of the evidence.

Brown, a mechanic, was employed by a subsidiary of Blythe Brothers Company, the lessee-purchaser of the machine. The machine was designated as a Euclid C-6 Crawler Tractor, weighing about 40,000 pounds, propelled by a diesel engine with automatic transmission and moving on

belt treads. At the time of his injury Brown was employed to service this and other heavy pieces being used by Blythe Brothers Company on a road-building job at Anderson, South Carolina. The machine had been operating normally for the approximately three months preceding the accident.

About eight o'clock on the evening of November 10, 1960 Brown and a fellow employee, Gulley, were preparing the tractor for use the next morning. To grease the universal joints, Brown seated himself on the left track, facing the engine, his legs extending down between the track and the body. While the task could be performed in a safer manner, that is by removing certain floorboarding, it was frequently done at the point Brown had selected.

Gulley was in the driver's seat where he could reach the starter button, but as it was then dark, he could not see whether the tractor was in gear. At Brown's request, Gulley "bumped", that is touched momentarily, the starter button to rotate the drive shaft merely to turn the grease fitting toward Brown. Instead, the engine was started and the machine, then in gear, moved backwards, crushing Brown between the tread and the heavy fender projecting over it.

Manufactured in Hudson, Ohio, the machine had been sold and delivered by G.M. in Ohio on August 18, 1960 to the manufacturer's dealer, from whom it was lease-purchased by the plaintiff's employer, Blythe Brothers.

The centerpiece of the plaintiff's claim is the starter mechanism on this tractor, which was new and different from that of other earlier earth-moving Euclids. The other

units carried an instrument called a micro switch, which broke the starting circuit except when the range selector control lever (the gear-shift lever) was in neutral. The purpose of the micro switch was to prevent unintentional starting of the machine while in gear. This was the type of starter system on the C-6 Crawler Tractors made by General Motors until July 1960 when it abandoned the micro switch for a new design which it considered more "rugged."

On the C-6 tractor which injured Brown, instead of a micro switch, the range selector control lever was equipped with a semicircular metal flange or shield, installed close to the starter button. Because of the position of the shield, an operator in the driver's seat could see the button only when the lever was in neutral. However, the button was accessible to an operator, though not without difficulty, if he reached his thumb or finger up behind the shield and into the space—measured as ⅛ or ¼ inch—between the shield and the button, as Gulley must have done.

Operator's Handbooks were issued by General Motors both for the pre-1960 and the subsequent C-6. The two publications are similar except that the later one includes a reference to the "mechanical block on the range selector lever". This book was delivered with the present tractor.

Under "Driving Instructions" is a description of each control, including the following:

> "1. Transmission Range Selector—Permits the operator to select the proper speed range for the prevailing work conditions. The lever MUST be in neutral in order to start the engine."

Still under "Driving Instructions" are these directions, which are especially apposite because Brown was hurt in the starting of the engine:

"NORMAL STARTING

* * *

"Shift the transmission into neutral. A micro switch or a *mechanical block* on the selector control lever does not permit the starter switch to operate unless the lever is in neutral." (Accent added.)

"TRANSMISSION OPERATING HINTS

Do not shift range selector into neutral *except when starting engine. Leave in gear at all other times."*

Under a heading of "SAFETY", a list with illustrative cuts of specific things the operator should "never" do, and what he should "always" do, is this caution:

"Make sure no one is working on unit before *starting* engine or moving tractor." (Accent added.)

The premise of Brown's claim is the change in the starter appliance from micro switch to shield. This modification, he contends, resulted in the following contractual and tortious breaches of responsibility. It violated: (1) express warranties in the handbook because the shield did not prevent the engine from starting while in gear; (2) the warranty of merchantability and fitness implied by law, since the shield was a latent defect and the machine, there-

fore, not reasonably safe for its purposes; (3) the law of negligence, in that no adequate warning was given of the danger arising from the change from micro switch to shield; and (4) the doctrine of strict tort liability, in that the C-6 contained a defect, and the supplier, G.M., was answerable to the user, Brown, without proof of negligence in the manufacture.[1] The last argument we are not compelled to classify precisely as correctly relating to warranty or to negligence. Rather, we shall measure the facts of the case against this and the other contentions of the plaintiff as each becomes pertinent.

For our decision we may assume, as Brown avers, that the court of the forum (North Carolina) would apply Ohio law to the warranty phase of the case. See Price v. Goodman, 227 NC 233, 37 SE2d 592 (1946). We assume, likewise, that under Ohio law the plaintiff, as one expected to use the unit, has standing to assert a breach of warranty against G.M. as the manufacturer, without proof of contract privity. Inglis v. American Motors Corp., 209 NE2d 583 (Ohio Sup. Ct. 1965). We assume, too, that Ohio has embraced the principle of strict tort liability. See Lomzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 NE2d 92 (1965); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 NE2d 612 (1958). As to negligence, concededly, the law of South Carolina, the lex loci delicti, controls.

---

[1] Restatement of the Law of Torts 2d, § 402A et seq.; Keeton, *Products Liability-Liability Without Fault and the Requirement of a Defect*, Texas Law Review 852, October 1963; Keeton, *Recent Decisions and Developments in the Law of Products Liability*, Insurance Counsel Journal 620, October 1965.

On plaintiff's claim of breach of express warranty, we think, the language posed by the plaintiff does not constitute an express warranty. Taken from the Operator's Handbook, it is pleaded and relied upon as consisting of the following sentences, included in the excerpts just quoted:

> "A micro switch or a mechanical block on the range selector lever does not permit the starter switch to operate unless the lever is in neutral.
>
> * * *
>
> "The lever MUST be in neutral in order to start the engine."

Entirely overlooked is the obvious character and function of these statements. An express warranty is generally defined as a factual affirmation or promise, the natural tendency of which is to *induce* the buyer to purchase the goods. See Roscher v. Bank Box Cleaners, 90 Ohio App. 71, 103 NE2d 404 (1951); Pritchard v. Liggett & Myers Tobacco Co., 350 F2d 479, 483 (3 Cir. 1965). While actual reliance by the buyer is not a requisite of a warranty, the characteristic of inducement to purchase is an indispensable ingredient of an express warranty. The statements here are not representations to induce the buying of the machine. Merely "advisory", they only instruct the operator on how the machine *should* be operated. Ivey-Dale-Owen Co. v. Worthington, 29 F2d 280 (5 Cir. 1928). Furthermore, they do not purport to vouch what *could or could not* be done with its mechanisms. The instructional character is manifested also by the associated directions in the manual. They all pertain to "Normal Starting". These explanations and directions are the only clauses on which the plaintiff structures his warranty claim. Plainly, he lifts them out of context.

However, if these statements in the handbook are to be treated as warranties, then all of them must be read, and read together, including for example this illustrated caution following the plaintiff's selections from the book:

> "Make sure no one is working on unit before starting engine. . . ."

Of course, a manufacturer may not avoid liability by general safety precautions, but here the warning specifically cautioned against the very conduct which led to the injury. Presently, to repeat, the manual was also most explicit in teaching the proper manner of starting the machine. As yet, a manufacturer is not obligated to define what can or cannot be done with its products, or to warn as to all possible dangers. See Jamieson v. Woodward & Lothrop, 247 F2d 23, 30 (D.C. Cir. 1957), cert. den., 355 US 855. In sum, under all the other facts, it is difficult to comprehend how liability can be predicated on the statements taken by the plaintiff from the instructional manual.

Although there be no express warranty, there is a warranty implied by law on the part of the manufacturer. It is an assurance that the product is free of latent defect, in merchantable condition and fit for the purpose for which it was made. Carney v. Sears, Roebuck & Co., 309 F2d 300 (4 Cir. 1962). To recover on such a warranty the plaintiff must show that one or more of these pledges has been broken. Only the presence of a latent defect is charged by the plaintiff.

But actually there was no defect. No contention is made that the shield was badly constructed, contained intrinsic flaws or was of defective design. At best the plaintiff ac-

cuses the shield as a latent defect because it failed to give protection equivalent to that of the micro switch. While the law does not imply such a warranty, no want of a comparable protection has been established. This will be evident in the discussion, post, of the same element anent negligence.

Of course, there is a responsibility upon a manufacturer to a user of its machine for negligence. In Restatement of the Law of Torts 2d, § 388,[2] it is put in this way:

> "Chattel Known to be Dangerous for Intended Use. One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

The immediate inquiry, then, is whether by using the shield rather than the micro switch G.M. fulfilled its duty

---

[2] See also Dillard & Hart, *Product Liability: Directions for Use and Duty To Warn*, 41 Va. Law Rev. 145 (1955).

not to put on the market without a warning of the hazard, a tractor embodying a latent danger. To start with, our conclusion is that the machine here involved has not been proved a dangerous instrumentality. While it is spoken of in plaintiff's brief as "tradition" or "custom", we are pointed to no proof that a tractor which will start in gear is per se a dangerous instrumentality. Accord: Yaun v. Allis Chalmers Mfg. Co., 253 Wis. 558, 34 NW2d 853 (1948). Hence no special instruction or warning was required.

But even if that obligation was here, the evidence affirmatively shows that it was satisfied or that G.M.'s failure to warn did not in any degree contribute to Brown's injury. That the shield was intended as a protection against the starting of the engine except when the selector lever was in neutral, was patent from the device itself. How the motor was started and the shield performed were obvious. As noted in Campo v. Scofield, 301 NY 468, 95 NE2d 802 (1950):

> "[T]he manufacturer is under no duty to render a machine or article 'more safe'—as long as the danger to be avoided is obvious and patent to all."

The shield in itself was a warning. It had no other purpose or function, the regular operator said as a witness for the plaintiff. Of course he knew, he further stated, the machine would start in gear if one reached under the shield and pressed the button. Other witnesses for the plaintiff testified similarly.

As the starter button was completely obscured from the driver when the engine was in gear, a glance told the operator that the button should not be pressed when the

shield was over it. As Gulley remarked on the stand, "It's [the shield is] there for a protective cover, so you can't start it. . . ."

It is obvious that both Brown and Gulley were aware that the tractor *could* be started in gear but that it *should not* be. They were well acquainted with the tractor and how it operated. Indeed, Brown had been a student of Diesel heavy equipment as well as a practical operator, and Gulley explicitly testified, ". . . I knew it had the cover on the starter button, to protect the starter".

In supplying the handbook for the use of the purchaser, the plaintiff's employer, G.M. fully responded to its duty to provide instructions or to warn, even assuming the equipment was a dangerous instrumentality. The passages already quoted confirm the scrupulous and painstaking concern of the producer to safeguard the operator. They squarely meet the calls of warranty and negligence. If the handbook was not shown to Brown or Gulley by their employer, who apparently deemed it superfluous as a warning, this was no fault of the defendant.

It should be noted that even the micro-switch device did not, according to the testimony, bar the starting of the engine while in gear. The switch could be readily by-passed, simply by putting one thumb on the starter button and the other on the switch, both being immediately in front of the operator.

Again, no principle of warranty or negligence required G.M. to provide the very best means of protection. The plaintiff can claim, at the most, only that the shield is not as efficient as the micro switch, but this is not enough to

impose liability on the manufacturer. Failure to adopt the most modern, or even a better safeguard, did not render the manufacturer liable to the injured mechanic. Marker v. Universal Oil Prods. Co., 250 F2d 603 (10 Cir. 1957); Campo v. Scofield, supra, 301 NY 468, 95 NE2d 802 (1950); Tyson v. Long Mfg. Co., 249 NC 557, 107 SE-2d 170 (1959). Exercising its judgment G.M. deliberately changed from micro switch to shield. There is no indication in the evidence that the shield was not at least a reasonable preventive of injury.

Finally and most importantly, both the rules of warranty and negligence apply only when the machine is operated in the manner intended for it. See, e.g., Hardman v. Helene Curtis Industries, Inc., 48 Ill. App. 2d 42, 198 NE2d 681 (1964); Strahlendorf v. Walgreen Co., 16 Wis. 2d 421, 114 NW2d 823 (1962). If not so employed, then the machine does not come within the implied warranty. Nor in such circumstances may liability be rested in tort, for the manufacturer cannot be held to foresee an unpredictable misuse. As stated in Marker v. Universal Oil Prods. Co., supra, 250 F2d 603, 606 (10 Cir. 1957):

> "While a designer or manufacturer may have a duty to warn of a latent limitation in even a perfectly made article, . . . no such duty extends to the potential danger involved in the totally unanticipated misuse of an item. [Citations omitted.]

When Gulley "bumped" the engine, as Brown directed, he was groping in the dark. He depended exclusively upon his feel for the instruments in order to turn the shaft. He cannot say whether he felt under the shield or just how he reached the starter. Concededly, if the engine was in gear,

he could touch the starter only by squeezing his thumb or finger between the shield and the button, contrary to the design of both.

Certainly, the manufacturer did not warrant the safety of the machine against a blind operation of it; nor was it reasonably foreseeable that the machine would be activated by one fumbling in the dark. See Marker v. Universal Oil Prods. Co., supra, 250 F.2d 603, 606 (10 Cir. 1957). While the question of proper use is generally for the jury, there must of course be evidence sufficient to raise the jury question. Surely, the acts of Brown and Gulley, including Brown's directions to Gulley, prove an utter want of compliance with this condition, thereby precluding submission of the issue to the jury.

Contributory negligence need not be considered for two reasons. First, primary negligence has not been established. Secondly, where as here, a consumer uses a product in a manner not intended by the manufacturer and suffers an injury as a result, he may not recover because such misuse is beyond the scope of the warranty. Pritchard v. Liggett & Myers Tobacco Co., supra, 350 F.2d 479, 485 (3 Cir. 1965).

This recount and discussion of the facts reveal that the plaintiff is not entitled to recover even under the doctrine of strict tort liability. This doctrine is basically one of public economic policy[3]—that a consumer's loss should be put on the manufacturer of the culpable product, to be included

---

[3] Restatement of the Law of Torts 2d, § 402(c), (g); Keeton, *Recent Decisions and Developments in the Law of Products Liability*, Insurance Counsel Journal 620, 629, October 1965.

as a cost of production. However, to come under even its broad aegis, there must be a showing of a defect in the accused device. None has been demonstrated by the plaintiff.

For these reasons we think there was no issue of liability to go to the jury and a verdict for the defendant should have been directed. The case will be remanded to the District Court for the entry of judgment for the defendant.

Reversed and remanded.

J. SPENCER BELL, Circuit Judge, dissenting:

I would affirm the judgment because I think the record offers more than enough evidence to support the jury's finding of breach of warranty by the defendant. At the very least I agree with the trial judge that the plaintiff is entitled on this record to have his claim of negligence submitted to a jury.

The majority is guilty of several errors which distort its analysis of the case. First, the conclusion that the statements contained in the manuals were not warranties because they did not tend to induce a sale. It is not necessary that a statement be a definite and crucial reason for the sale but only that it be one of a package of attributes which the buyer is seeking. Certainly a careful purchaser, knowing that his employees will be working on the machinery at night under adverse light conditions, is concerned with the safety devices built into the equipment. In any event I think that this court exceeds its authority in finding as a matter of law that the statements do not constitute a warranty in

this type of case where the suit is in tort under the Ohio law of strict tort liability. Under the factual context of this case I think the matter would have been more properly left to the jury.

Second, the majority argues that the manuals adequately warned against "starting" the machine, but this overlooks the very heart of the plaintiff's case. The plaintiff was not attempting to "start" the machine—that was the very thing he did not want to do. He was merely attempting to "bump" the starter in the usual and customary manner in order to turn up the grease cup on the drive shaft. The majority lays much stress on their conclusion that there was no "latent" defect in the machine. But the fallacy of this argument is that it equates latent defect with design defect and ignores the very essence of the plaintiff's case, which is that the latent defect consisted in removing the micro-switch, a safety device on which its users were accustomed to depend, and substituting therefor the shield.

It is generally accepted law that when one undertakes to provide for the safety of another when he knows that the other will rely on this undertaking he must take care in termination of that assistance. ". . . the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated." Restatement 2d, Torts § 323 comment c. This holds true whether or not there is any duty to provide for the other's safety. In a similar situation the Ohio court said:

> "The rule generally recognized is that, notwithstanding that a railroad is under no duty to maintain a flagman at a particular crossing, if it has customarily provided one to warn of the approach of all trains to that crossing, then, at least so far as persons who know of that customary practice are concerned, the failure of a watchman to warn of an approaching train may constitute negligence, even in an instance where the approach of such train would not ordinarily involve an unusual hazard to an approaching automobile." *Tanzi* v. *New York Central R. Co.*, 155 Ohio St. 149, 98 N.E.2d 39, 24 A.L.R.2d 1151, 1158 (1951).

No warning was given of the hazard left by the replacement of the micro-switch by the mechanical block. The general warning statements relied upon by the majority were contained in the previous manuals for the models with micro-switches. Certainly their verbatim continuance cannot give warning of a *new* hazard to one already familiar with the machines. At the one place where a new statement was added it stated the function of the mechanical block as identical to that of the micro-switch, in fact, it merely inserted the words "or mechanical block" after the words "micro-switch."[1] This gives no adequate indication of a new hazard. A mechanical block, to the average reader, could have served the function of the micro-switch of making the starter circuit inoperative. We think the majority usurped

---

[1] Original wording:

A micro switch on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral.

Revised wording:

A micro switch or a mechanical block on the range selector lever does not permit the starter switch to operate unless the lever is in neutral.

the function of the jury when it concluded that the shield was, to the ordinary observer, an obvious substitute for the micro-switch which was removed without warning. A jury could conclude that the shield was apparently there to prevent the operator from accidentally hitting the starter button while the machine was in motion and was therefore an additional "safety" feature to the micro-switch. There is nothing in the record to justify the notion that a user would, upon seeing the shield instantly deduce therefrom that the micro-switch had been withdrawn. Finally, it may be quite true that a manufacturer is not required to use the most modern or expensive safety devices, but once having accustomed his users to a particular device we submit a jury could find negligence in the withdrawal of that device without adequate warning, and it is immaterial that another more or less efficient device is substituted. Even the defendant did not contend that the shield was a more efficient device but merely that it was "more rugged." Cheaper would be a better description.

The majority concedes the manufacturer's liability to the user of its machine for negligence, citing the Restatement of the Law of Torts 2d § 388. This section makes the manufacturer liable for injury in its normal use if (a) the danger is foreseeable and (b) not apparent to the user and (c) he fails to warn. We pass over the argument that a 20 ton hydromatic tractor crawler which will start in gear is not a chattel known to be dangerous when employed for its intended use. The universality of the micro-switch and similar devices to prevent machines from being unintentionally started in gear is adequate evidence of their dangerous propensities. In any event the question was for the jury. There was evidence that the danger was foreseeable by the

manufacturer, as the defendant's own witnesses testified they knew of the manner of greasing used by the plaintiff and they warned their own dealers of the change, presumably because they thought it not apparent.

Before turning to the law of Ohio relating to warranties let me point up certain aspects of the facts of this case which will be relevant to the application of that law. While the evidence showed that it was possible to lubricate the universal joints upon which the plaintiff Brown was working by removing four bolts and lifting up the floor boards of the machine, all the evidence showed that it was customary and was the practice to perform this service by sitting on the tracks as the plaintiff was doing when injured. Mr. Faggart, an experienced employee of the Euclid distributor which sold the machine, testified that this was the normal practice. He also conceded that although the defendant's maintenance manuals recommended frequent greasing of these joints, they did not suggest any specific position from which they could be reached. The evidence also showed that the machine was functioning normally at the time of the accident and that it was possible to start the machine in gear by pressing on the starter button with the thumb or forefinger when the machine was in first gear. The built-in slippage of the automatic transmission made it possible for the engine to be started in gear; the diesel engine was highly responsive, especially when the engine was hot. The tractor weighed 40,000 pounds and stood half again as high as a man's head.

In *Greenman* v. *Yuba Power Products, Inc.*, 377 P.2d 897 (1962), cited by the Ohio court in *Lonzrick* v. *Republic Steel Corporation*, 1 Ohio App.2d 374, 205 N.E.2d 92, the

plaintiff was injured by a power tool purchased by his wife from the defendant. The action was on express warranties included in a brochure which accompanied the tool and which the plaintiff claimed to have read. The court, citing *Rogers* v. *Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, pointed out that the abandonment of the requirement of privity, the recognition that the liability is imposed on the manufacturer by law and the refusal to allow the manufacturer to define the scope of its own responsibility for defective products make it clear that the liability is not one governed by the law of contract warranties. The court added:

> "In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. . . . Under these circumstances it would not be controlling whether the plaintiff selected the machine because of the statements in the brochure or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the job it was built to do."

I think the Ohio cases and those upon which the Ohio court expressly relied in enunciating its doctrine make it clear that the Ohio law of product liability goes beyond the requirement of proving negligence; it would hold the manufacturer for any injury to one who was using the product in the manner in which it was intended to be used. I think this would apply whether the injury arose out of a defect in the product, per se, or out of the manner of its distribu-

tion such as an inadequate warning of a latent danger in its normal use,[2] or improper instructions as to its use. The danger must, of course, be reasonably foreseeable and the injury must be proximately caused by the default of the manufacturer.

Turning now to the case at hand, I think the court correctly charged the jury under the Ohio doctrine of strict tort liability for manufactured products that the defendant was responsible if the plaintiff's injury was proximately caused by a breach of the defendant's express warranty that the machine would not start in gear. This is true even though the plaintiff did not have knowledge of the express warranties contained in the operator's and maintenance manuals. It was for the jury to determine whether or not the plaintiff's reliance on the absence of any warning was a proximate cause of his injury—and the express warranty was clear proof that such notice was not forthcoming from the manufacturer. Nor was this the only evidence which went to the jury on this issue, for the defendant's service manager and safety expert[3] testified that although he knew

---

[2] In *Ross* v. *Phillip Morris & Co. Ltd.*, 328 F.2d 3 (8 Cir. 1964), cited in *Lonzrick*, the court held that under Missouri law the manufacturer would be liable in damages where he "did not warn of the probability of lung cancer resulting from smoking the defendant's cigarettes." See also: *Product Liability: Directions for Use and the Duty to Warn*, Dillard and Hart, 41 Va.L.R. 145, and cases therein cited.

[3] Mr. Knight, who was service representative for the Euclid Division of General Motors for Virginia and North Carolina, testified that in addition to his safety work he kept the dealers informed on improvements in the products and equipment, held service meetings, helped to settle claims, kept the factory informed as to Euclid performance in the field and things of that nature.

of the change in the starter and informed his dealers, he did not inform his customers and users, of which latter class the plaintiff was a member.

The fact that the machine itelf may not have constituted a dangerous instrumentality in the absence of the express warranty would not in my opinion relieve the defendant. Users of its products over a long period of time were entitled to an adequate warning of any change which constituted a hidden danger to those who were accustomed to use defendant's products, and defendant was as liable for a danger created by change without warning as for an inherent defect in the machine itself. A manufacturer who works in concert with his authorized dealer (as here where the manufacturer prepares and dealer distributes descriptive literature with the product to potential users) is as much liable for a negligent failure to warn as for an inherent defect in the machine. *Cf. Vandermark* v. *Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P.2d 168 (1964). A fortiori, he is liable for an express misstatement of a characteristic of his product which, as here, lulls his users into danger and injury.

Mr. Morgan, Blythe's chief mechanic, testified that he received and placed on file in his library for study the manuals distributed with this machine when he first saw the machine on the job sometime prior to the accident. Morgan, and indeed the defendant's witness Faggart, testified that it was long standing practice to grease the tractor crawlers just as the plaintiff was doing by sitting on the tracks. It would be wholly incompatible with the concept of strict liability to hold that the plaintiff must have had personal knowledge of the defendant's false warranty which not only would not

have warned him, but would in fact have misled him. It is enough that the manufacturer could reasonably foresee that the danger existed when they changed the design of the starter not only without giving their customers and users a proper warning but by expressly misrepresenting the fact. I think this issue was correctly submitted to the jury in the judge's charge that they must find the defendant's breach of warranty to be the direct and proximate cause of the plaintiff's injury.

FILED
JUL 8 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted]211

A. L. BROWN,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

Bynum M. Hunter
Counsel for Respondent
700 Jefferson Building
Greensboro, North Carolina 27402

James B. McMillan
Counsel for Respondent
800 N. C. National Bank Building
Charlotte, North Carolina 28202

INDEX

	Page
STATUTES	1
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	2
1. Preliminary Statement	2
2. The Parties and the Background	2
3. The Evidence as to How the Plaintiff was Injured	3
4. Description and Operation of the Euclid C-6 Crawler Tractor	5
5. The Text of the Operator's Manual, Including the Alleged Warranty	10
6. The Question of Communication and Relevance of the Alleged Warranty; The Question of Proximate Cause	12
The Photographs of the Tractor	12A-12F
7. The Experience of the Petitioner Brown	16
ARGUMENT	17
A. There are no Special or Important Reasons Presented for Granting a Review on Writ of Certiorari	17
B. The Evidence was Insufficient in Law to Establish Liability in Negligence	18
C. The Evidence was Insufficient in Law to Establish Liability on Warranty	21
CONCLUSION	23
APPENDIX	25
PROOF OF SERVICE	28

TABLE OF CASES

Page

Ford Motor Co. v. McDavid, 259 F. 2d 261 (4th Cir., 1958), *cert. den.* 358 U. S. 908 19

MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 19

Marker v. Universal Oil Products Co., 250 F. 2d 603 (10th Cir., 1957) 19

Murray v. Benson Aircraft Corp., 259 N. C. 638, 131 S. E. 2d 367 (1963) 21

Perfecting Service Co. v. Products Development and Sales Co., 261 N. C. 660, 136 S. E. 2d 56 (1964) 21

Pontifex v. Sears, Roebuck & Co., 226 F. 2d 909 (4th Cir., Va., 1955) 20

Ragan v. Merchant's Transfer and Warehouse Co., 337 U. S. 530, 93 L.Ed. 1520, 69 S.Ct. 1233 18

Rogers v. Toni Home Permanent Co., 147 N. E. 2d 612 (Ohio St. 1958) 21

Terry v. Double Cola Bottling Co., Inc., 263 N. C. 1, 138 S. E. 2d 753 (1964) 21

Thurston Motor Lines, Inc. v. General Motors Corp., 258 N. C. 323, 128 S. E. 2d 413 (1962) 21

Tuttle v. U. S. Slicing Co., 335 F. 2d 63 (4th Cir. Va. 1964) 20

Yount v. Positive Safety Manufacturing Co., 319 F. 2d 324 (6 Cir., 1963) 22

STATUTES AND RULES

N.C.G.S. 1-52(1) 1, 21, 27

Ohio Revised Code, Sec. 1315.13 (Uniform Sales Law) 1, 21, 22, 26

Ohio Revised Code, Sec. 1315.16 (Uniform Sales Law) 1, 22, 26

Rule 19, Revised Rules of the Supreme Court of the United States 18

Rule 50(a), Federal Rules of Civil Procedure 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1393

A. L. BROWN,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

STATUTES

Ohio Revised Code (Uniform Sales Law, effective in Ohio until July 1, 1962): § 1315.13. Express Warranty (G. C. §8392); §1315.16. Sale in Which Warranty is Implied (G. C. § 8395). Appendix p. 26.

North Carolina General Statutes, Ch. 1, Sub.-Ch. II, Limitations, Art. 5, G. S. 1-52 (1). Appendix p. 27.

QUESTIONS PRESENTED

It is respectfully suggested that the petitioner has not correctly stated the questions presented and that the correct questions are as follows:

(1) Are there any special or important reasons for granting a review on writ of certiorari in this case?

(2) Did the Court of Appeals correctly rule that the evidence was insufficient in law to establish liability in negligence?

(3) Did the Court of Appeals correctly rule that the evidence was insufficient in law to establish liability on warranty?

STATEMENT OF FACTS

1. Preliminary Statement

The petitioner's statement of "facts", which is almost the identical statement he made in the Court of Appeals, paints a picture which the respondent respectfully submits is distorted. The petitioner's statement contains almost no quotations from the evidence except, on pages 7 and 8, some quotations from one of the exhibits. These quotations are incomplete and out of context and therefore misleading. The respondent submits the following as a factual rather than an argumentative summary of the pertinent facts.

2. The Parties and the Background

General Motors in 1960 manufactured a Euclid C-6 Crawler Tractor which was sold to a dealer and resold to a leasing company and which, in Octboer 1960, was being used by the lessee, Blythe Brothers, on a road grading job on an interstate highway near Anderson, South Carolina.

The petitioner, Alexander L. Brown, a resident of North Carolina, was employed by Charlotte Equipment Company as a maintenance and lubrication mechanic. On November 10, 1960, he was injured while working about the crawler tractor at Anderson, South Carolina. His employer's insurance carrier has paid and is still subject to paying workmen's compensation benefits under the North Carolina Workmen's Compensation Act (Vol. I, pp. 193-194).

3. THE EVIDENCE AS TO HOW THE PLAINTIFF WAS INJURED

The petitioner testified that he was working for Charlotte Equipment Company maintaining Blythe Brothers equipment on the highway grading job near Anderson, South Carolina on November 10, 1960; that it was dark and about eight o'clock at night; that he approached the Euclid C-6 crawler tractor with the idea of greasing it and that he could not recall any details of the accident. (Vol. I, pp. 19-20).

For a first-hand account of the accident we must look to the only other eyewitness, Robert A. Gulley. Gulley testified that he and Brown were trying to find a way to lubricate the *rear* universal joint on the drive shaft without going through the labor of taking up the floor boards (Vol. I, pp. 88-89, 91), which was the usual and easier method (Vol. I, pp. 131-132, 166, 201). Gulley further testified (Vol. I, pp. 54-55):

> "We started servicing the C-6 tractor; it was then after dark, and I had a trouble line [light] rigged . . . Mr. Brown . . . was down on the track, to grease the joints on the main drive of the tractor. I was up on the tractor at the driver's seat, and . . . *he asked me to bump* the starter so he could see the grease fitting . . . (Emphasis added.)
>
> "So I bumped the starter, and when I did, the

> tractor started up, and he was sitting down on the track, with his legs down between the track and the machine; well, when the engine started, it was in reverse gear, and it pulled him back underneath the ledge that sticks out over the track, which is about, I'd say, ten inches, I don't know exactly how much it is, but I'd say it is approximately ten inches above that; well, it pulled him back underneath the track, and I saw what was going on, and I reached over and pushed the forward-reverse lever in the forward position, and when I saw that he cleared this ledge, well, I cut the tractor off . . ."

Gulley further testified that he was working in the dark (Vol. I, p. 54); that he could not see what position the controls were in (Vol. I, p. 68); that he did not change any of the controls before starting the engine (Vol. I, p. 68); that he had never had any instruction on how to operate this new unit (Vol. I, pp. 74, 79); that he *did not check to see the position of the controls* (Vol. I, pp. 84-85); that he did not pay any attention to their position (Vol. I, p. 92); and just assumed the unit was not in gear (Vol. I, p. 97) and that the throttle was off (Vol. 1, p. 98). [1]

Charles L. Knight, service representative for General Motors, was called on and made and reported on a check of the machine a week or so after the accident. The petitioner introduced part of his report, which read as follows (Vol. I, p. 192):

> "I have checked out and determined that there are no malfunctions in this unit's normal starting system. For example, with the range selector lever in neutral,

---

[1] It is noteworthy that the jury found Gulley negligent by its answer to the fifth issue, Vol. I, p. 297.

with throttle wide open and the directional lever in either forward or reverse, the unit may be started without any danger of its moving. Furthermore, the range selector on this unit is equipped with a shield which allows the starter button to be completely exposed *only* in neutral. Although the starter button could be pressed and the unit started in any range, it would be with some difficulty and rather awkward. All of the facts point to human error and/or negligence as being the cause of this accident."

Thus matters stood for nearly three years, until, on August 20, 1963, the petitioner filed this suit against General Motors. He also filed a separate suit (which is still pending) in Superior Court of Rowan County, North Carolina against Blythe Brothers Company (Vol. I, pp. 324-9), alleging that:

> "The said machine would not have started in gear nor would it have moved nor would it have started at all, if it had been properly parked and secured for the day by the defendant [Blythe Brothers] and its employees and agents." (Vol. I, pp. 50, 326).

4. Description and Operation of the Euclid C-6 Crawler Tractor

The Euclid C-6 tractor is a crawler type tractor with endless treads on each side and weighs over 40,000 pounds. There was a bulldozer blade in front, with a cable to raise and lower the blade (Vol. I, p. 12). There were both headlights and a dash light (Vol. I, pp. 162, 172-173).

The C-6 has an automatic transmission with no conventional clutch. It has a six cylinder diesel engine (Vol. I, p. 94) with no spark plugs, which means that the fuel mixture in the cylinder is ignited by the heat of compression rather than by an electric spark plug (Vol. I, pp. 31,

94). The engine turns a drive shaft about 3 1/2 feet long (Vol. I, p. 88), which operates an automatic transmission behind and below the driver's seat. There are two universal joints on this drive shaft (Vol. I, pp. 88-89). The transmission turns the drive axles which make the tractor crawl on its endless tracks. The diesel engine starts more readily when warm (Vol. I, pp. 30-31, 94, 108). This was fully known to Gulley and to petitioner Brown, who had had seven months of training in diesel engines (Vol. I, p. 10). Gulley knew this engine was still warm (Vol. I, p. 68).

In this brief are six labeled photographs illustrating the controls on the tractor. The photographs are reproductions of trial exhibits. The labels and comments have been added for clarity.

The *Starter Button* or switch is mounted on a bracket under the cowling in front of and below the operator's left knee. The operator can see the starter button when the *Range Selector Lever* is in neutral, but he cannot see the button when the Range Selector Lever is in gear (Vol. I, pp. 14, 17), because the starter switch is then covered by a heavy metal *Shield or Mechanical Block* which is mounted on and pivots forward and backward with the Range Selector Lever (Vol. I, p. 17). When the *Throttle* is "ON" the engine will start in any gear *if* the operator reaches under the metal shield and presses the starter switch. (Vol. I, pp. 151-153).

The *Range Selector Lever* is the lever used to control the speed of the tractor. When the lever is pushed all the way forward, the gears will be in neutral, and the starter switch will be exposed to the operator's view. When it is pulled back to the first or "1" stop, the tractor is *in first gear,* and *the starter switch is concealed from the operator's view* by the mechanical block or metal shield on the Range

Selector Lever (Vol. I, pp. 14, 17-18, 150)[2]. It is also concealed when the lever is pulled back to second and third gear positions.

Although there is some conflict in the testimony, it is virtually impossible to push or "bump" the starter button in any gear other than neutral without the operator's finger or thumb coming in contact with the mechanical block or shield (Vol. I, pp. 104, 123, 139, 150, 176-7). In first gear, the clearance between the shield and the starter button by actual measurement is no more than 1/8 inch to 1/4 inch (Vol. I, p. 176), which means the thumb or finger has to be squeezed or forced between the button and shield (Vol. I, p. 177). This was amply illustrated by petitioner's witness Gulley during a jury view at the trial when he was requested to put the range selector lever in first gear and then attempt to put his thumb on the starter button. When he did so, he had to insert his thumb up under the shield, and his thumb was in contact with the shield (Vol. I, p. 139).

The *Throttle Control Lever* shuts the engine off when pulled all the way back (Vol. I, p. 36). This lever must be pushed *forward* to start the engine (Vol. I, p. 173). If it is in the "OFF" or rear position the engine will not start (Vol. I, p. 149).

The *Forward-Reverse Lever* controls direction of travel. When this lever is pushed forward, the tractor goes forward. When it is pulled back the tractor goes backward.

---

[2] In this connection, petitioner has reproduced two photographs at pages 14 and 15 of the petition, by which an attempt is made to infer that the mechanical block or shield does not adequately cover the starter button when the range selector lever is in first gear. These photographs were taken from a position *below the operator's seat* looking upward and are hardly fair representations of the true situation as the witness Gulley admitted (Vol. I, pp. 81-83).

When it is in the middle or neutral position, the tractor is out of gear and won't move (Vol. I, pp. 113-114, 135).

There are two *Foot Brakes;* the left one stops the left tread and the right one stops the right tread. Each brake has a lock on the floorboard and can be locked on (Vol. I, p. 218).

Steering is accomplished by pulling back on the left and right Steering Clutches (Vol. I, p. 6, Exhibit #4, Operator's Manual, p. 8). Pulling back on the left steering clutch, for example, retards or stops the drive wheels on the left side and retards or stops the left track, and the unit turns by pivoting about the left track.

Prior C-6 models had an electric switch (micro-switch) to prevent unintended starting in gear. The micro-switch was mounted under the cowl in front of the range selector lever and was actuated by it. The 1960 shield or mechanical block was also designed to prevent unintentional starting in gear. It was more durable and reliable (Vol. I, p. 236) and harder to by-pass (Vol. I, p. 169) than the old micro-switch. However, *neither Gulley* (Vol. I, p. 79) *nor Brown* (Vol. I, p. 37) *had ever seen a C-6 with a micro-switch,* while Roy Stevens, the C-6 operator, and Crowell Morgan, the head mechanic, who *had* seen previous models, thoroughly understood how both models operated (Vol. I, pp. 112, 120-121, 123).

Proper stopping and parking procedures call for the controls to be left as follows (Vol. I, pp. 126, 128, 218):

Throttle—*Off* (Vol. I, p. 126).

Range Selector Lever—*In Neutral* (Vol. I, p. 218).

Brakes—*Locked on* (Vol. I, p. 218).

Bulldozer Blade—*Resting on Ground* (Vol. I, p. 218).

According to the evidence, the tractor could *not* have

started as Gulley claimed and moved backward unless *all* the following conditions occurred: [3]

(1) The left brake was off (Vol. I, pp. 155-156);

(2) The left steering lever was released (See Operator's Handbook, p. 12);

(3) The forward-reverse lever was in reverse (Vol. I, pp. 155-156);

(4) The throttle was "ON" (Vol. I, p. 155);

(5) The range selector was in gear with the starter button covered by the mechanical block or shield (Vol. I, pp. 155-156); and

(6) The starter button was pressed—*intentionally*—by someone reaching under the shield. (Vol. I, p. 156).

Gulley testified that he made no check whatever as to the position of the controls and never saw Brown make any check that night (Vol. I, pp. 84-85, 105). He said that he just pressed the starter, *assuming* the tractor was not in gear (Vol. I, pp. 89, 97, 99) and that the throttle was off (Vol. I, pp. 89, 97, 99).

No testimony, expert or otherwise, was offered to show that the design of the unit was unsafe.

No evidence was offered and no contention was made that the unit was not operating as it was designed to operate.

It was testified to and stipulated that the controls were

---

[3] Under these circumstances and with the engine warm, there would be a time lag of three to six seconds before the machine would move at all after the engine started up (Vol. I, pp. 174, 204-5). But if the engine was already running and the range selector lever was then shifted from neutral into first or any other gear, the machine would move immediately (Vol. I, pp. 174-5).

operating as designed by General Motors (Vol. I, pp. 112, 215).

There is no evidence that the unit was defective in operation or that there was any malfunction of any part of it.

5. THE TEXT OF THE OPERATOR'S MANUAL, INCLUDING THE ALLEGED WARRANTY

General Motors published an Operator's Handbook (Vol. I, p. 5, Exhibit #4), and a Maintenance Manual (Vol. I, p. 5, Exhibit #5). *Neither Gulley nor Brown had ever seen either publication* (Vol. I, p. 74) *nor had the contents been communicated to them,* nor was their conduct influenced by them; and they therefore appear to have nothing to do with the case. Among the various advices, descriptions and warnings in the Operator's Handbook were the following (Vol. I, pp. 217-220):

PAGE 8 (describing the controls):

"1. Transmission Range Selector — Permits the operator to select the proper speed range for the prevailing work conditions. The lever MUST be in neutral in order to start the engine."

PAGE 11 "Starting and Stopping the Engine."

"NORMAL STARTING"

"For normal starting push the *throttle* lever forward to the center position to allow fuel oil to flow to the engine cylinders.

"Shift the transmission into neutral. A micro switch *or a mechanical block* on the range selector control lever does not permit the starter switch to operate unless the lever is in neutral." [4] (Emphasis added).

---

[4] Petitioner, in quoting a part of this paragraph, has always omitted the all-important first sentence.

PAGE 12 "Stopping the Engine" (Vol. I, p. 218).

"1. Pull both steering levers all the way rearward (toward the operator) to stop the tractor. After the tractor stops, release the steering levers to release the brakes. The brake pedals can also be used to apply the brakes. Lock the brake pedals in the applied position.

"2. Shift the range selector lever into the neutral position. It is necessary to move the neutral block lever to permit the range selector lever to go into neutral.

"3. Pull the throttle lever back (toward the operator) against the stop. Move the stop lever to the right and then pull the throttle lever back to the 'OFF' position."

PAGE 13 under the caption "PARKING THE TRACTOR", is a diagram showing the throttle should be left in the "Off" or "Stop" position. Paragraph 2 in part reads:

"Be sure both brake pedals are depressed and locked in the applied position . . . (Vol. I, p. 218).

Paragraph 5 reads:

"5. If the tractor is equipped with a dozer blade or ripper be sure they are lowered and are resting on the ground."

PAGE 17: "TRANSMISSION SHIFTING"

* * *

"During normal operation, the transmission range selector lever MUST be left in gear and the forward-reverse lever shifted into neutral when the tractor is brought to a temporary stop."

* * *

PAGE 18: "TRANSMISSION OPERATING HINTS"

[i. e., while the machine is in operation]

"Do not shift range selector to neutral *except when starting engine.* Leave it in gear at all other times."

PAGE 25: There is a cartoon showing a man being hurt by the left track of the crawler, with a caption:

"Make sure no one is working on unit before *starting* engine or moving tractor."

PAGE 26: Under an appropriate cartoon:

"Never allow passengers to ride anywhere on tractor except next to operator on platform."

PAGE 26:

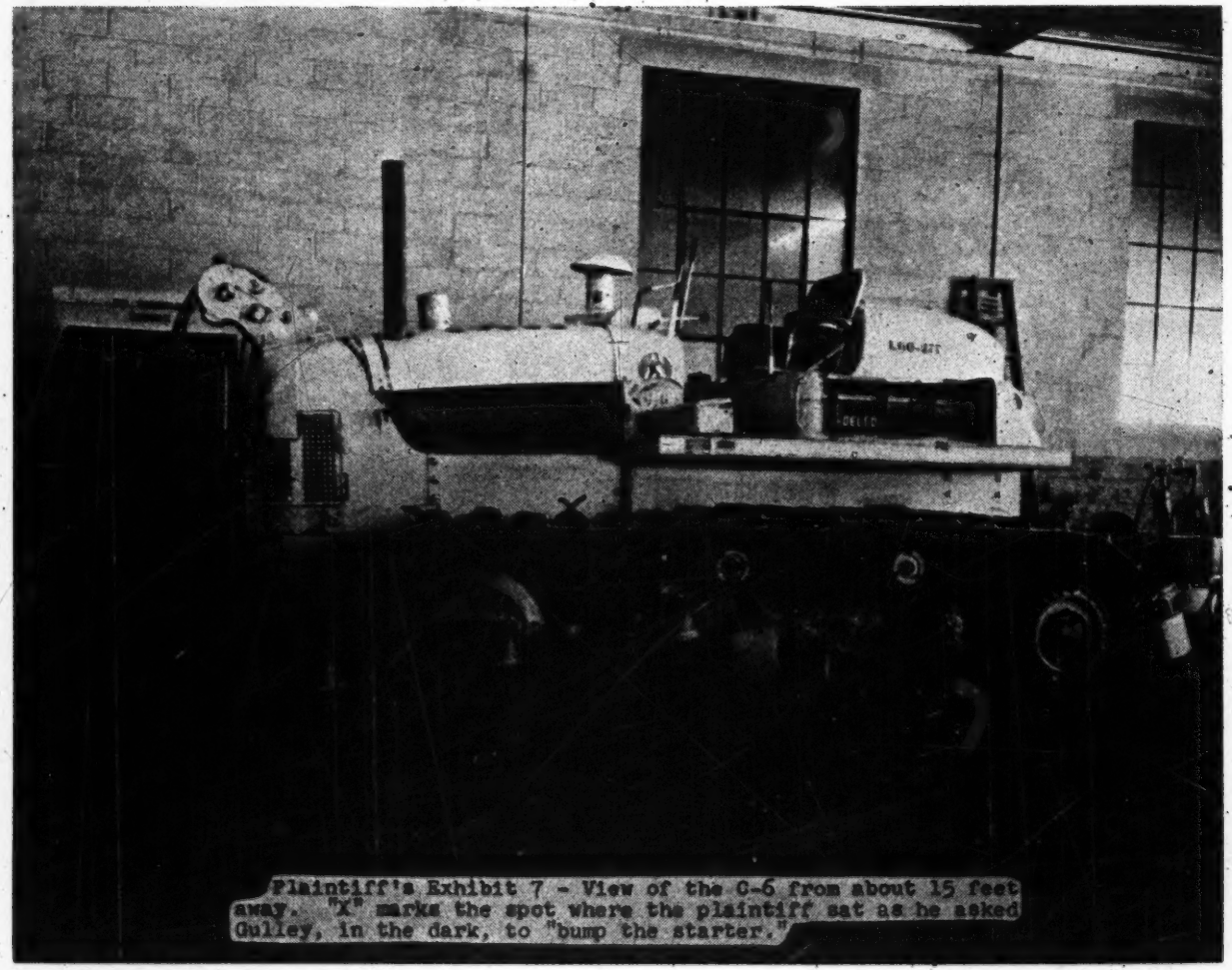
"Set parking brakes when unit is not in operation . . ." (Vol. I, p. 220).

"You bet your life every time you take a chance." (Vol. I, p. 220).

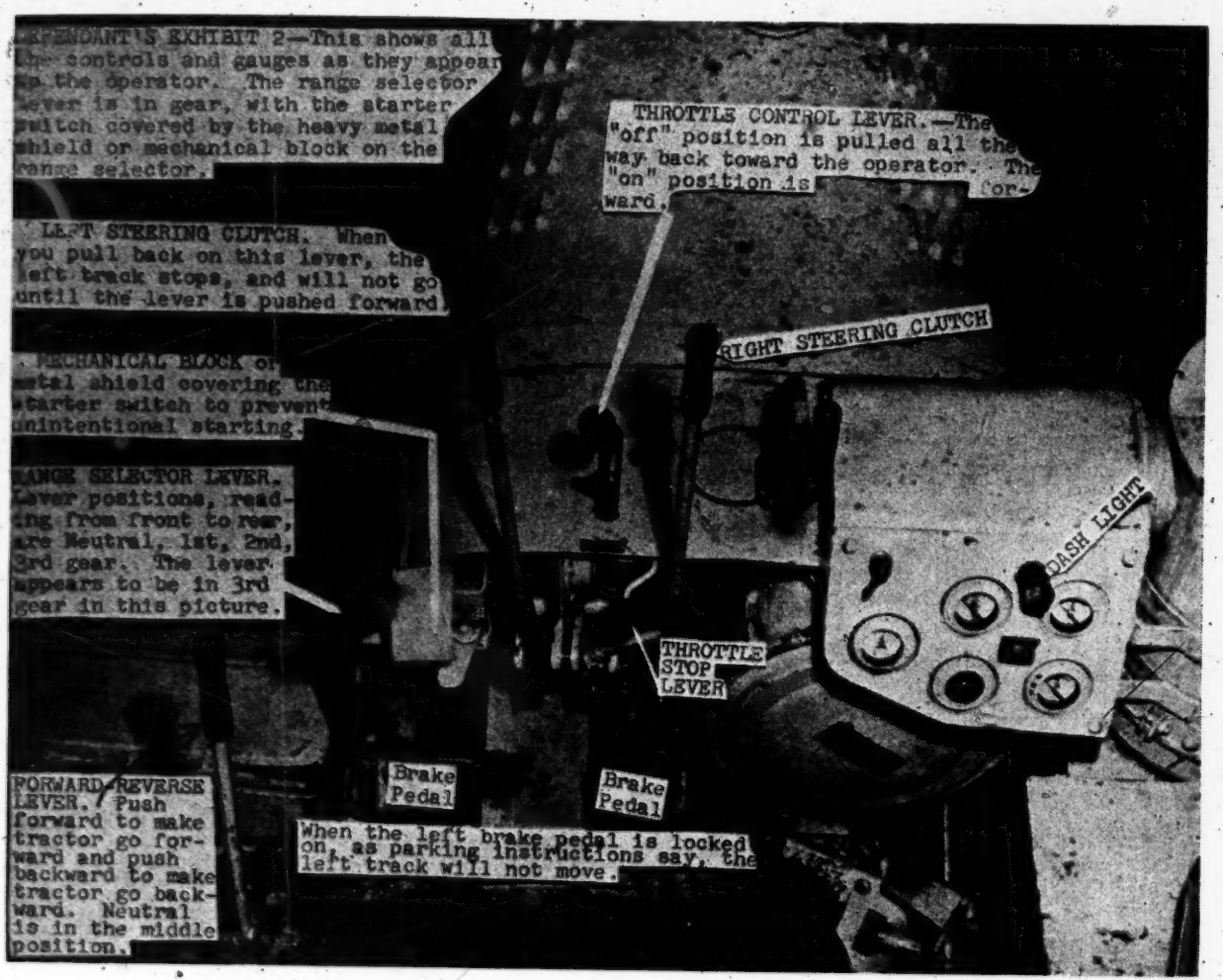
6. THE QUESTION OF COMMUNICATION AND RELEVANCE OF THE ALLEGED WARRANTY; THE QUESTION OF PROXIMATE CAUSE

The manuals or handbooks were sent by General Motors to the purchaser, Mitchell Distributing Company, a day or so after the C-6 was delivered (Vol. I, p. 5). There is no evidence that they were read before the sale or that they induced any sale or lease or were part of a contract of sale or lease.

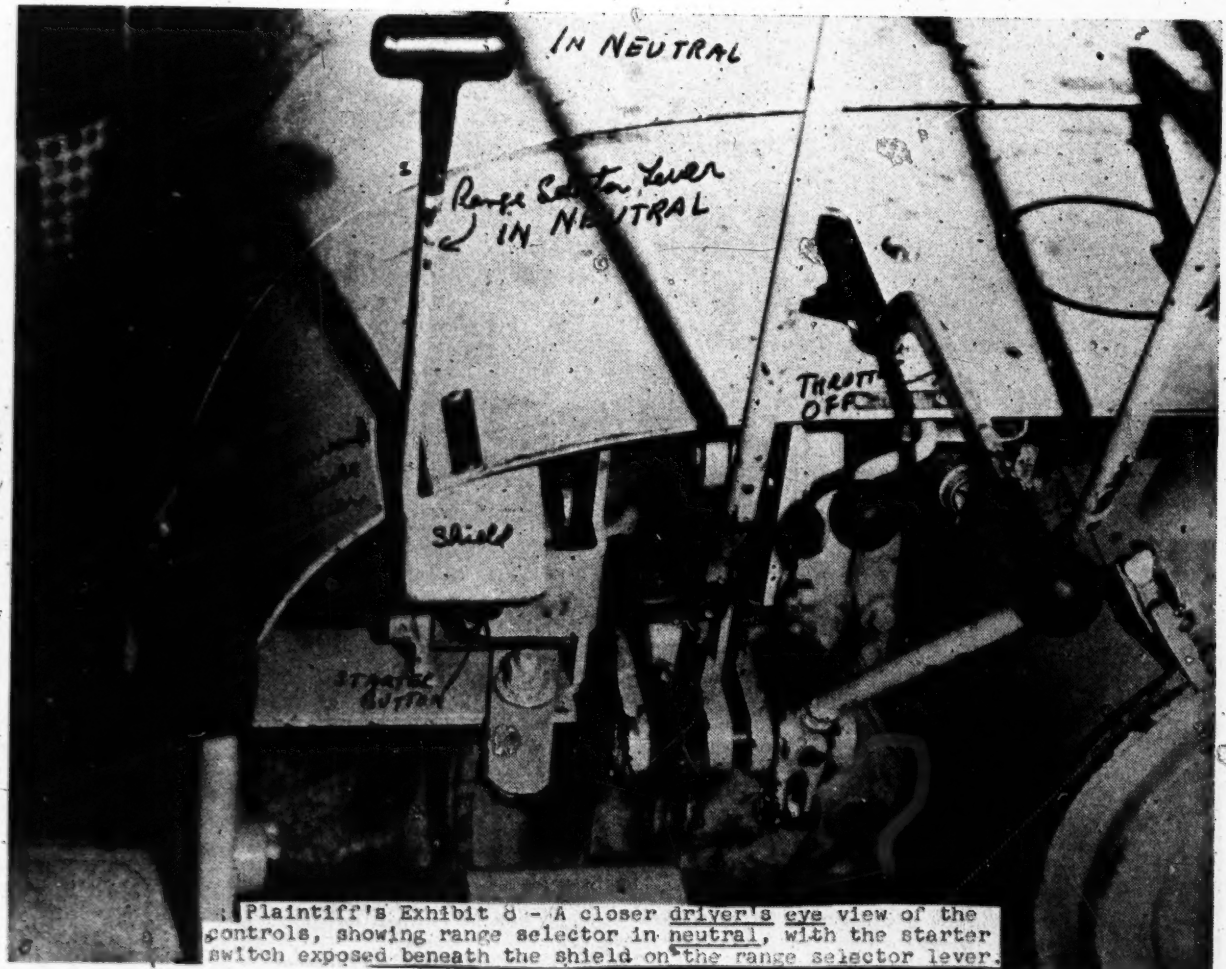
Crowell E. Morgan, petitioner's witness, a mechanic and "trouble shooter" for petitioner's employer, (Vol. I, p. 161) was the only witness who seems to have seen the manuals before the accident. He testified that he did not know when the manuals were received (Vol. I, p. 164), but that he did not see them until after he first saw the tractor on the job (Vol. I, p. 166) at Gastonia some time before the accident (Vol. I, p. 166). He did not say a word in his 34 pages of testimony (Vol. I, pp. 160-189, 221-224)



Plaintiff's Exhibit 7 - View of the C-6 from about 15 feet away. "X" marks the spot where the plaintiff sat as he asked Gulley, in the dark, to "bump the starter."


RIGHT STEERING CLUTCH
DASH LIGHT
THROTTLE STOP LEVER
Brake Pedal
Brake Pedal

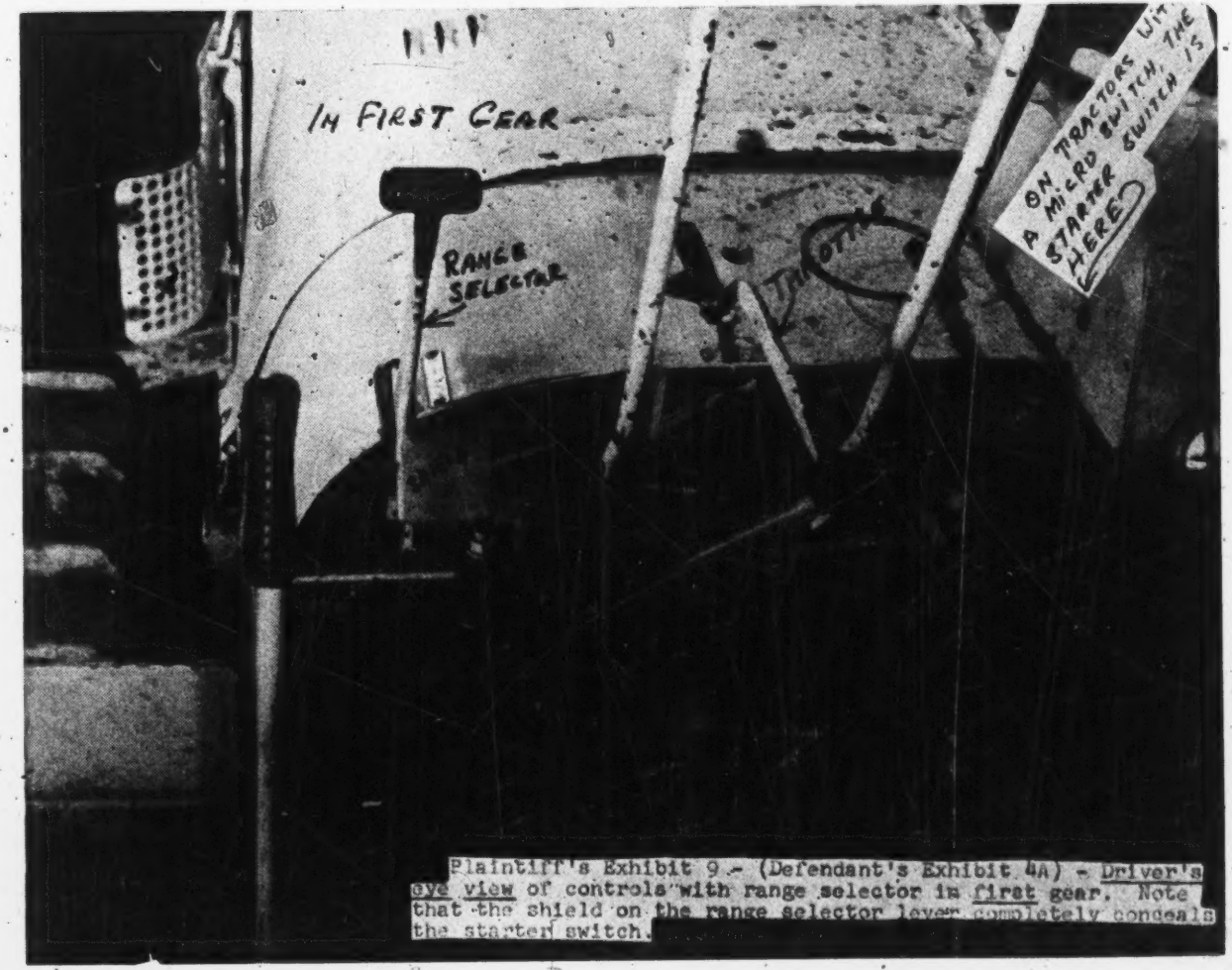
12B



Plaintiff's Exhibit 8 - A closer driver's eye view of the controls, showing range selector in neutral, with the starter switch exposed beneath the shield on the range selector lever.

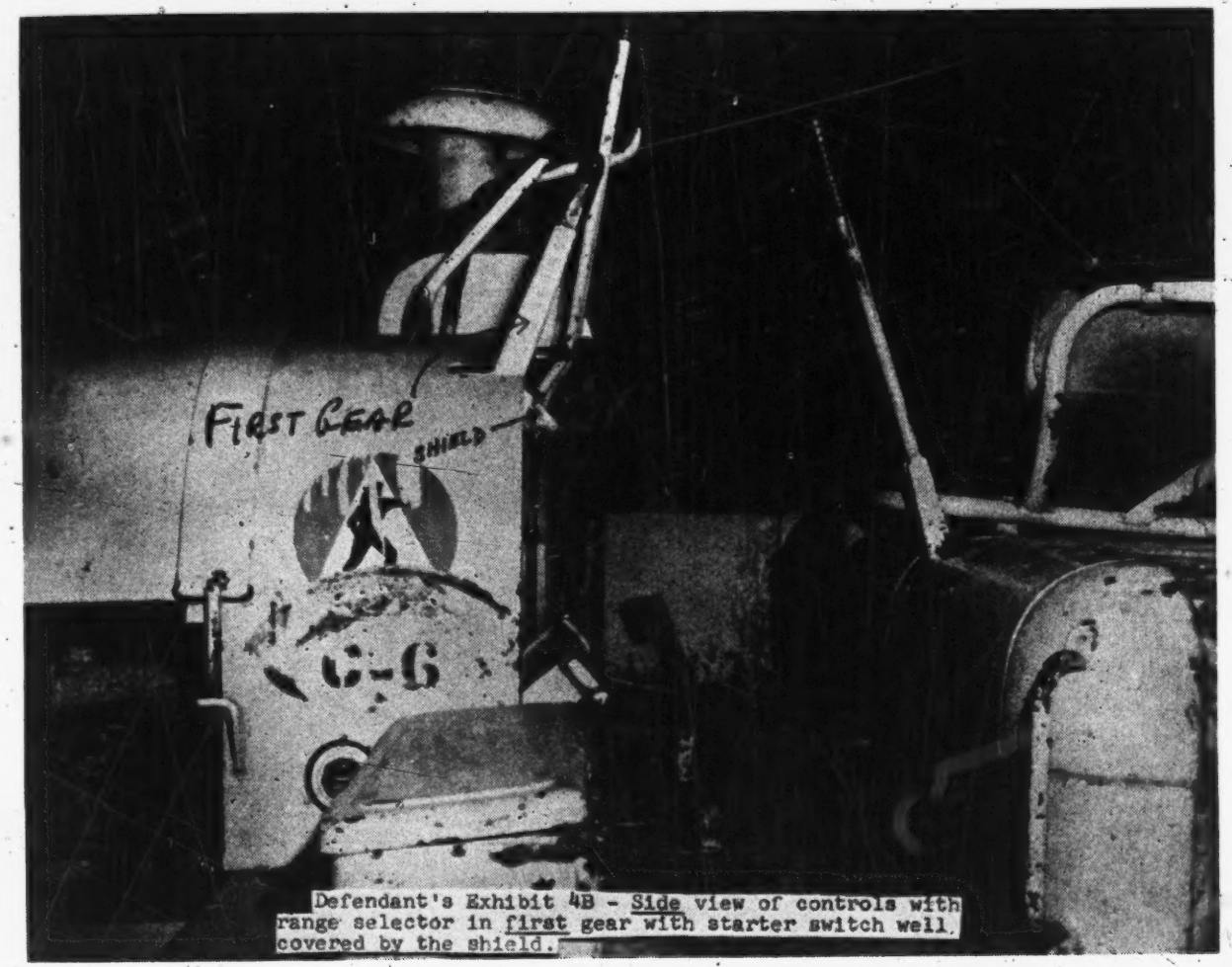
GEAR SELECTOR
MECHANICAL BLOCK OR SHIELD
STARTER BUTTON
NEUTRAL
G-6
RIGHT BRAKE LOCK
LEFT BRAKE LOCK

the range selector in neutral. The starter switch is visible.

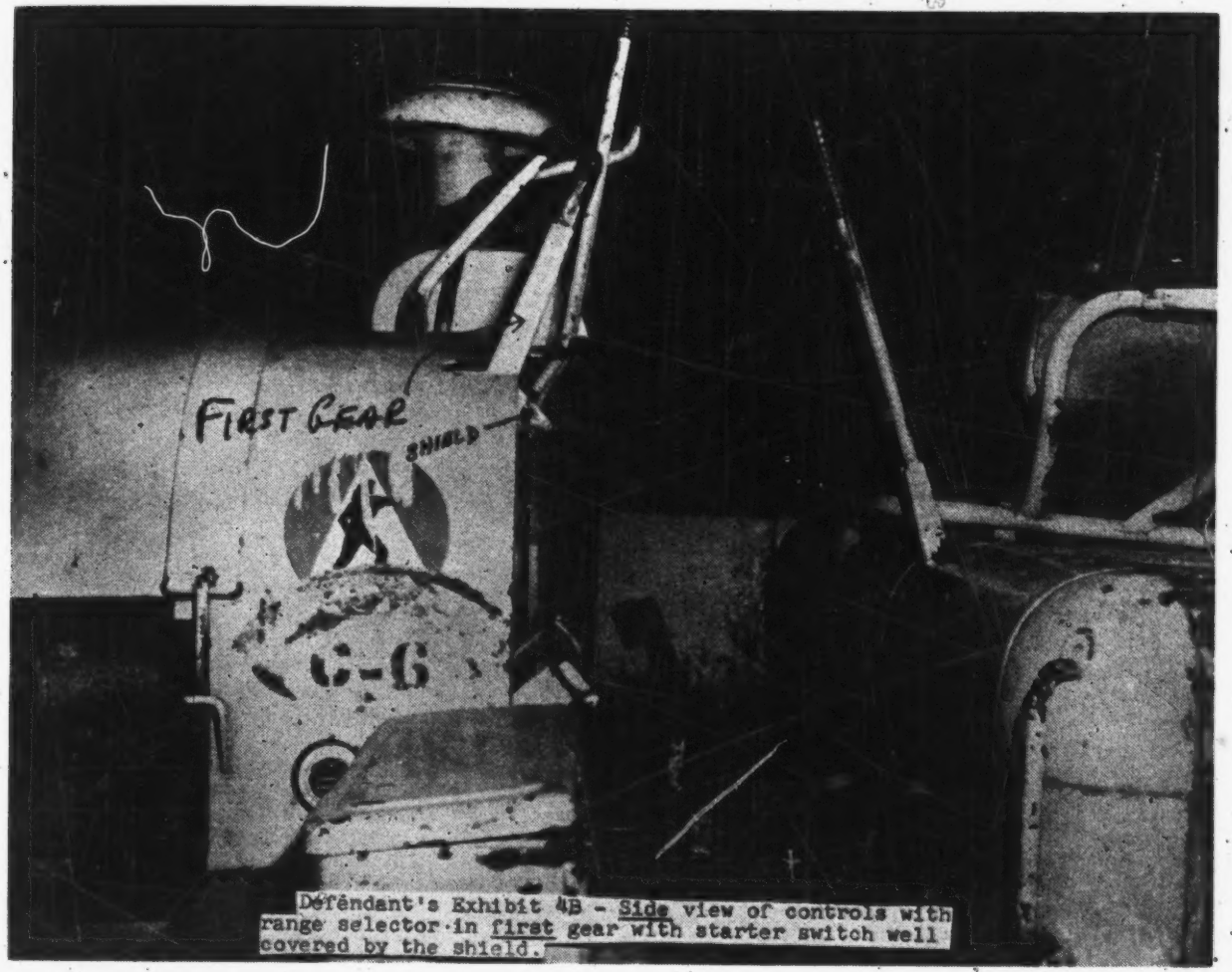


Plaintiff's Exhibit 9 - (Defendant's Exhibit 4A) - Driver's eye view of controls with range selector in first gear. Note that the shield on the range selector lever completely conceals the starter switch.

12E



Defendant's Exhibit 4B - Side view of controls with range selector in first gear with starter switch well covered by the shield.



Defendant's Exhibit 4B - Side view of controls with range selector in first gear with starter switch well covered by the shield.

12F

about the contents of the manuals or about any reliance on them. He said the tractor operates now just as it always has (Vol. I, pp. 175, 189); that if the unit would not start in gear there would be no point in having a shield (Vol. I, p. 176) over the starter button; that the shield or mechanical block is one type of neutral starting arrangement (Vol. I, pp. 168, 170) and the micro-switch, such as earlier models had, is another type (Vol. I, pp. 168, 170); that "if the switch and everything worked normally, it would not accidentally hit it, it would not start accidentally" (Vol. I, p. 186); and his testimony shows that he fully understood how the machine operated.

Morgan testified (Vol. I, p. 168) and demonstrated (Vol. I, p. 223) that the micro-switch on the older C-6 could be by-passed while sitting in the driver's seat with ease, and with only finger pressure (Vol. I, pp. 169-170), by anyone who set out to do so (Vol. I, pp. 168-169); and that all Euclid equipment, with or without automatic transmissions, could be started in gear (Vol. I, pp. 168-169) by anyone who disregarded the normal operating procedures.

Alexander Brown, the petitioner, (even though there is no evidence he ever saw or heard of the manuals before the accident) understood the operation of the tractor as it actually was. His testimony on direct examination is as follows (Vol. I, pp. 14, 17):

> "Yes, it had, starting left to right, there was a forward and reverse lever, it had a neutral in between the forward and reverse, and then left to right, next was your speed range lever, which had a neutral and one, two, three speed ranges on it; right under the shield there, it had a molded shield on the lever that *when the speed range lever was in neutral you press the starter, and it would start up, because the shield un-*

covered the button, and when in a sitting position the shield covered the button, and you couldn't hit the button with your thumb; that was the way I usually started it." (Emphasis added.) (p. 14).

* * *

"Q. Mr. Brown, from the operator's point of view, what happened when you pulled the range selector lever back towards the operator?

"A. Well, it engaged the automatic transmission in gear."

Q. *And from the operator's point of view, state whether or not with the machine in gear it was possible to see the starter button?*

"A. *Well, I never did see it, sitting in the operator's seat, I never saw the starter button when it was in gear.*" (Emphasis added.) (p. 17).

Robert A. Gulley had never had any instruction about the unit. "I didn't have a manual or a handbook or anything on the tractor" (Vol. I, p. 74). He had "never seen any of the manuals or handbooks or any kind of operating instructions on the tractor." (Vol. I, pp. 74, 80). He had never serviced or seen another C-6 (Vol. I, p. 79).

What went on in Gulley's mind is best shown by his revealing statements (Vol. I, pp. 89-90, 98) that he

> "figured, with the blade resting on the ground, and with it parked there, it would not be in gear" (pp. 89-90), "and that the throttle would be off." (p. 98).

These statements show that he knew the unit should not be started except in neutral; his other testimony (Vol. I, p. 103) shows that he knew the shield on the range selector lever was there for a protective cover over the starter button, and (Vol. I, p. 103) that if the machine would not

start in gear there was no purpose in having the shield over the starter button. He demonstrated on the machine itself that the shield covers the starter button from the operator's view (Vol. I, p. 135) when the machine is in gear, and that in first gear, when he touched the starter button, his thumb was in contact with the shield. (Vol. I, p. 139).

Roy Stevens testified that he had been the C-6 operator on the day of the accident (Vol. I, pp. 109-110); that he knew that you could start the machine in gear by reaching underneath the shield and pressing the starter switch (Vol. I, p. 121), but that he did not report this to anyone (Vol. I, p. 111), because

> ". . . it just looked to me like that was the way the machine was built, I didn't see any reason to say anything about it." (Vol. I, p. 112).

Stevens had previously operated a C-6 on which the neutral starting device was a micro-switch (Vol. I, p. 121); before the accident he was aware the C-6 in question had a different type of starter (Vol. I, p. 121); he knew the purpose of the shield (Vol. I, p. 121); he knew there was no purpose in having the shield unless the machine would start in gear (Vol. I, p. 121).

Stacey Williamson (Vol. I, p. 140), the head mechanic from whom Brown and Gulley took their instructions (Vol. I, p. 147), testified that certain Euclid machines had a neutral starting device called a micro-switch (Vol. I, pp. 145-146); that certain others, the C-6 and TC-12, had been changed so that the neutral starting device was a mechanical block or shield (Vol. I, pp. 145-146); that the purpose of both systems was to prevent accidental starting in gear (Vol. I, p. 153); that all neutral start systems can be by-passed with very little trouble (Vol. I, p. 153); that he knew the shield could be by-passed by reaching under

it and pressing the starter button, even with the machine in gear (Vol. I, p. 155). Williamson, who had spent his working life as a mechanic (Vol. I, p. 141) testified that all his experience with C-6s had been with tractors whose neutral starting was provided by a mechanical block and that (Vol. I, p. 152): "I've never seen a C-6 with a micro switch on it . . ."

Guy Faggart (Vol. I, pp. 199-213), testified that he was familiar in November 1960 with the C-6 (Vol. I, p. 200); *that any time you "bump" the starter the engine may crank up, especially if it is warm* (Vol. I, p. 203); that the purpose of the shield was to cover the starter to prevent accidental starting in gear (Vol. I, pp. 205-206); that the customary method of greasing the rear universal was to remove the floor board (Vol. I, p. 201).

There is absolutely no evidence of any kind to show that the manuals or handbooks played any part in inducing a sale or lease, or in influencing the conduct of anyone connected with the accident.

7. The Experience of the Petitioner Brown

The petitioner in 1960 was 43 years old; had attended Davidson College three years (Vol. I, p. 8); had had considerable technical experience in military service, including combat demolition training (Vol. I, p. 9); had operated a dairy farm for years.

In 1959 he got out of the dairy business. He attended a professional truck driver's school in Raleigh at N. C. State College (Vol. I, p. 10). He then spent seven months of full time training in diesel engines, heavy transmissions and welding at the Nashville, Tennessee, Auto Diesel School (Vol. I, p. 10). He worked several months as a maintenance man on Euclid rock trucks for W. E. Graham & Sons at Winston-Salem, (Vol. I, p. 31). He worked as a

mechanic for Miller Equipment Company, repairing tractor-trailers (Vol. I, p. 32). He came to Charlotte Equipment Company in May or June, 1960 (Vol. I, p. 11), and worked as a heavy equipment mechanic and welder for them until November 10, 1960.

Brown had operated the C-6 in question (Vol. I, p. 13); he "usually" started it with the gear in neutral (Vol. I, p. 14); he had actually been the one who installed the bulldozer blade cable on it (Vol. I, p. 13) in Gastonia, two months earlier. He had helped start the various machines each morning at Anderson (Vol. I, p. 39).

Brown and Gulley both knew that a warm Diesel engine may and often does start immediately if you touch the starter button, and that Diesels don't have conventional spark plugs (Vol. I, pp. 31, 95, 108).

ARGUMENT

(A) THERE ARE NO SPECIAL OR IMPORTANT REASONS PRESENTED FOR GRANTING A REVIEW ON WRIT OF CERTIORARI

The Court of Appeals simply held *as a matter of law* that the evidence was insufficient to establish liability, either on warranty or in negligence, and that respondent's motion for a directed verdict, which was made pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, should have been granted.

Petitioner's argument is that he has been deprived of his right to a jury trial as guaranteed by the Seventh Amendment because the Court of Appeals allegedly undertook "to resolve disputed issues of fact." This is an effort to contrive a constitutional question where none exists,

since the judicial resolution of any issue as a matter of law would thereby deprive every litigant of the right to a jury trial. Thus, no constitutional question is presented. The petitioner had a jury trial. The jury found no negligence on the part of the respondent (Vol. I, pp. 285, 296), but returned a verdict for petitioner on the warranty issue (Vol. I, pp. 285, 296) pursuant to the District Court's peremptory instruction (Vol. I, p. 256, 284).

The Court of Appeals interpreted the law of the various states involved, and applied that law to the evidence in reaching its result. This Court ordinarily accepts the interpretation of local law by the Court of Appeals. *Regan v. Merchant's Transfer and Warehouse Co.*, 337 U. S. 530, 93 L.Ed. 1520, 69 S. Ct. 1233.

Moreover, there is no important or unusual question involved here. This is a relatively simple personal injury "products liability" case, and while fully recognizing that the granting or denying of the petition is in the Court's discretion, we do not believe any reasons for granting a writ of certiorari have been shown by petitioner in accordance with Rule 19 of the Revised Rules of the Supreme Court or otherwise.

(B) THE EVIDENCE WAS INSUFFICIENT IN LAW TO ESTABLISH LIABILITY IN NEGLIGENCE

We respectfully submit that the Court of Appeals was correct in holding that the evidence was insufficient to establish any actionable negligence on the part of the respondent.

There was absolutely no evidence, expert or otherwise, that the mechanical block or shield type of starter mechanism on the C-6 was negligently designed. The fact that the mechanical block or shield was a different type of neutral starting arrangement from that used on some other

earth-moving equipment or on earlier C-6's is certainly no evidence of a negligent design. See *Marker v. Universal Oil Products Co.*, 250 F. 2d 603 (10 Cir. 1957). It was stipulated that the C-6 was working entirely in accordance with its design, and there was no evidence whatever of any defect in any part of the C-6 or of negligence in its manufacture or assembly.

Petitioner's apparent contention that a warning should have been given in the Operator's Manual of a change from the micro-switch to the mechanical block is without merit. If a warning had been given, it would have done neither petitioner nor Gulley any good because neither ever saw or heard of the Manuals before the accident. Their employer never communicated the contents of the Manuals to them. Of course, the mechanical block or shield was the best "warning" that could possibly be asked for. This was recognized by numerous witnesses. Its purpose was obvious.

It is agreed that South Carolina law applies on the negligence phase of the case, and the Fourth Circuit has recognized that the doctrine of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, applies in South Carolina. See *Ford Motor Co. v. McDavid*, 259 F. 2d 261 (4 Cir. 1958), *cert. den.* 358 U. S. 908. But, the Court said in footnote 4 at p. 265:

> "In South Carolina, a manufacturer of a chattel is not liable to a remote vendee for loss caused by a defect which does not make the chattel dangerous in its normal use."

But here there was not a defect of any sort in the C-6. Certainly it was not dangerous in its normal use, and there is no evidence of anyone ever having been injured on or about a C-6 before or since the accident. In fact, General Motors had never received a complaint from anyone about the starting mechanism on the C-6's (Vol. I, p. 217).

In *Pontifex v. Sears, Roebuck & Company,* 226 F. 2d 909 (4th Cir. Va. 1955), the plaintiff was injured when she was struck in the eye by a rope pulled to start the gasoline engine of a lawn mower. A directed verdict in the District Court was affirmed, *per curiam,* by the Fourth Circuit. The plaintiff complained of negligence in the design of the lawn mower in that the rope was not permanently attached to the spring recoil mechanism and that no warning was given of this fact and the inherent danger in it. The Fourth Circuit said:

> "We do not think . . . that it can be held to be negligence to sell an old model machine not equipped with a safety device of later models, and we find no evidence of negligence in the design or construction of the machine or of any need for warning or of any other negligence upon which a verdict for plaintiff could have been based."

Tuttle v. U. S. Slicing Co., 335 F. 2d 63 (4th Cir. Va. 1964) was a negligence action where it was contended that a meat grinding machine was inherently dangerous and no warning of the danger had been given by the maker and seller to those who foreseeably would use it. In affirming summary judgment in favor of the manufacturer and seller, the Fourth Circuit held that the machine was not an inherently dangerous instrumentality, "especially as it was without structural or functional defect . . ." The grinder had originally been fitted with a protective grill which had been taken off, and the plaintiff got his hand caught in the machine. It also appeared the plaintiff had some familiarity with the machine.

We submit there is no evidence of actionable negligence on the part of the respondent and that the Court of Appeals was correct in its ruling.

(C) THE EVIDENCE WAS INSUFFICIENT IN LAW TO ESTABLISH LIABILITY ON WARRANTY.

Assuming, as did the Court of Appeals, that the C-6 tractor in question was sold in Ohio on August 18, 1960, then we look to the law of Ohio on warranty. [5] In 1960, the Uniform Sales Law was in effect in Ohio, and Sec. 1315.13 of the Ohio Revised Code defined an express warranty as:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to *induce* the buyer to purchase the goods, *and* if the buyer purchases the goods *relying* thereon . . ." (Emphasis added.)

In the celebrated case of *Rogers v. Toni Home Permanent Co.*, 147 N. E. 2d 612 (Ohio St. 1958), the Court said:

> ". . . an express warranty may be defined as an affirmation of fact by the seller of a product or commodity to induce the purchase thereof *and* on which affirmation the buyer relies in making the purchase." (Emphasis added.)

---

[5] At the trial no evidence was presented as to just where the sale of the C-6 took place. The evidence was susceptible of the conclusion that the sale took place in North Carolina (Vol. I, p. 3, 321). If so, privity of contract between petitioner and respondent would have to be shown to establish liability in warranty, express or implied. See *Murray v. Benson Aircraft Corp.*, 259 N. C. 638, 131 S. E. 2d 367 (1963); *Perfecting Service Co. v. Products Development and Sales Co.*, 261 N. C. 660, 136 S. E. 2d 56 (1964); *Terry v. Double Cola Bottling Co., Inc.*, 263 N. C. 1, 138 S. E. 2d 753 (1964).

If the sale was consummated in Ohio on August 18, 1960, as petitioner now contends, then, the three year statute of limitations applicable in North Carolina would have run since this suit was not instituted until August 20, 1963 (Vol. I, p. 288), and petitioner's warranty action would be barred. See N. C. G. S. § 1-52(1) (apdx. p. 27) and *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N. C. 323, 128 S. E. 2d 413 (1962).

As was said by the Court of Appeals (Opinion, p. 7): "The statements here are not representations to induce the buying of the machine. Merely 'advisory', they only instruct the operator on how the machine *should* be operated." Obviously they did not *induce* the purchase of the C-6 and there is no evidence that they did. Thus, the Court of Appeals correctly held, as a matter of law, that there was no express warranty.

Moreover, since neither Gulley nor the petitioner Brown ever saw or heard of the Operator's Handbook prior to the accident, neither could have relied upon the statements. There is no evidence that anyone else relied on them either.

In *Yount v. Positive Safety Manufacturing Co.*, 319 F. 2d 324 (6 Cir. 1963) it was said:

> ". . . this is an Ohio case, and, as to express warranty, reliance thereon is specifically required by Ohio Revised Code, Section 1315.13 of the Uniform Sales Law, which provides that an express warranty arises only 'if the buyer purchases the goods relying thereon***'.
>
> "With regard to an implied warranty of reasonable fitness, reliance is required by Ohio Revised Code, Section 1315.16 of the Uniform Sales Law, which provides that an implied warranty arises only when 'it appears that the buyer relies on the seller's skill or judgment.' "

Although this case was tried solely on an express warranty theory, petitioner, on appeal to the Court of Appeals, raised the question of an implied warranty. But there is no evidence of a breach of any implied warranty. There was no defect in the C-6 of any kind. It was operat-

ing as it was designed to operate, and there was no evidence of any defective design.

As to the doctrine of strict tort liability, it does not apply since there was no evidence of any defect, and the case was not tried on that theory.

We submit that the Court of Appeals was correct in holding that the evidence was insufficient as a matter of law to establish liability on warranty.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Bynum M. Hunter
700 Jefferson Building
Greensboro, North Carolina 27402
Counsel for Respondent

James B. McMillan
800 N. C. National Bank Building
Charlotte, North Carolina 28202
Counsel for Respondent

UNIFORM SALES LAW

(Effective in Ohio until July 1, 1962)

OHIO REVISED CODE:

§ 1315.13. Express Warranty (G. C. § 8392). Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

§ 1315.16. Sale in Which Warranty is Implied (G. C. § 8395). Subject to § 1315.01 to 1315.76, inclusive, of the revised Code and any law applicable thereto, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(A) When the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

(B) When the goods are bought by description from a seller who deals in goods of that description, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

(C) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(D) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(E) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the useage of trade.

(F) An express warranty or condition does not negative a warranty or condition implied under such sections unless inconsistent therewith.

NORTH CAROLINA GENERAL STATUTES

North Carolina Civil Procedure. Ch. 1, Sub-Ch. II, Limitations, Art. 5.

The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article.

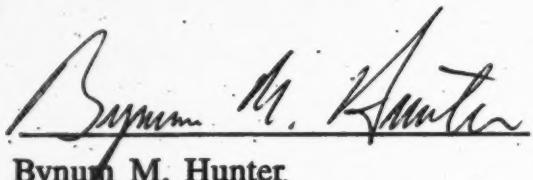
* * *

N. C. G. S. 1-52. *Three Years* — Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.

PROOF OF SERVICE

I, Bynum M. Hunter, one of the attorneys for the respondent, General Motors Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of July, 1966, I served copies of the foregoing Brief for Respondent in Opposition on the attorneys for the petitioner by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows: Wm. Clarence Kluttz, Esq. and Lewis P. Hamlin, Jr., Esq., Wachovia Bank Building, P. O. Box 58, Salisbury, North Carolina 28144.



Bynum M. Hunter
Counsel for Respondent
700 Jefferson Building
Greensboro, North Carolina 27402

Office-Supreme Court, U.S.
FILED
SEP 21 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 211

A. L. BROWN,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY OF PETITIONER TO BRIEF OF RESPONDENT

WM. CLARENCE KLUTTZ
LEWIS P. HAMLIN, JR.
Wachovia Bank Building
P. O. Box 58
Salisbury, North Carolina 28144
Attorneys for Petitioner

INDEX

Page

CASES CITED i

REVIEW ON WRIT OF CERTIORARI SHOULD BE GRANTED 1

ON THE WARRANTY ISSUE THE LAW OF OHIO IS IGNORED IN RESPONDENT'S BRIEF 2

THERE WAS A FACTUAL ISSUE AS TO NEGLIGENCE ON WHICH PETITIONER IS ENTITLED TO A JURY TRIAL IF THE WARRANTY JUDGMENT IS NOT AFFIRMED 5

CASES CITED

Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 NE 2d 92 (1965); affd. 6 Ohio St. 2d 227, 218 NE 2d 185 (1966) 3

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1393

A. L. BROWN,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONER TO BRIEF OF RESPONDENT

REVIEW ON WRIT OF CERTIORARI SHOULD BE GRANTED

There are adequate and important reasons for granting review by writ of certiorari in the present instance. This is a products-liability case involving the responsibility of a

manufacturer of a bulldozer for its defective and negligent design. It is representative of an increasing volume of litigation in our complex economy to fix and determine the responsibility of manufacturers of motor vehicles and machinery to remote users. These cases are very largely in the federal courts because of the diverse citizenship of the parties involved, since large manufacturers of such machinery constantly distribute beyond the state of origin.

In the present case the questions are: (1) whether the Court of Appeals shall be permitted to override the clearly established and applicable law of Ohio governing breach of warranty, and (2) whether the Court of Appeals shall be permitted to determine disputed issues of fact and thus deny to the petitioners a jury trial on the issue of negligence, which is concededly governed by the laws of South Carolina.

The Court of Appeals has decided these important questions of State law in conflict with the decisions of these States and has denied to the petitioner his right to a jury trial under the Seventh Amendment to the Constitution of the United States.

ON THE WARRANTY ISSUE THE LAW OF OHIO IS IGNORED IN RESPONDENT'S BRIEF

This record, and indeed the respondent's brief, leaves it undisputed that this bulldozer did in fact start in gear. Such starting was contrary to the claim made by General Motors that it would not start in gear and was contrary to long standing custom in the design of these machines. If there was a warranty under Ohio law, as we say there was, this warranty was clearly breached, for General Motors own witness admitted that the machine did not meet the claim made for it. (Record Vol. I, pp. 230-31)

Respondent argues the case by ignoring the established law of Ohio covering the responsibility of a manufacturer of a defective product—either in warranty or strict liability. The Ohio case of *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 NE 2d 92 (1965), which was the controlling case relied upon by the plaintiff in the trial court and the Court of Appeals, is not even cited by the respondent. After Petition for Certiorari was filed (but before the General Motors brief in opposition) the Supreme Court of Ohio affirmed the *Lonzrick* case, 6 Ohio St. 2d 227, 218 NE 2d 185 (1966) and fully supported the reasoning of the intermediate appellate decision. Again this is not cited by the respondent, who instead continues to rely upon the Ohio Sales Act, as did the majority decision in the Court of Appeals for the Fourth Circuit. (See G.M. Brief pp. 1, 21, 22, 26) The *Lonzrick* case (both on the intermediate appeal and in the Ohio Supreme Court) established that under Ohio law of products liability the Sales Act has no bearing, nor need the plaintiff show a relationship of privity or prove reliance upon representations of the seller. This is a case of warranty sounding in tort, based upon and flowing from the implied representation of the manufacturer who produced the product and placed it in the channels of commerce.

We quote from the decision of the Ohio Supreme Court, affirming the intermediate appellate court in *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 NE 2d 185:

> "The precise questions this court is required to determine are: (1) Where a defendant manufactures and sells roof joists, is there implicit in the production and sale of this product the representation that the joists are of good and merchantable quality and safe for their ordinary intended use? and (2) when, in fact, such steel joists were defective and while being devoted to their ordinary intended

use collapsed because of such defect and fell to the floor and injured the plaintiff, who was working on the floor below these steel roof joists in a place where his presence was reasonably to be anticipated by the defendant manufacturer, is such innocent injured party restricted to prosecuting a tort action for damages on the basis of negligence alone, or may be proceed in tort on the theory of an implied warranty?" (218 NE 2d at 188-9)

* * *

"This 'kind of warranty' arose not out of a contract of sale but out of the duty of a manufacturer or seller of a product to protect the person consuming or using that product in the ordinary way in which it was intended to be used from the harm of injury to person or property caused by a defect in the product." (218 NE 2d at 190)

* * *

"It is, then, settled law in this state, *Toni*, supra, and *Inglis*, supra, that there can be an action in tort, based upon breach of warranty, and no contractual relation between the plaintiff and the defendant is required." (218 NE 2d at 192)

The Ohio Supreme Court also held specifically that there was no need for the plaintiff to show that he had relied upon a representation made by the defendant:

"The fact that the plaintiff saw the advertisement is a sound basis for recovery, *but the fact that he did not read an advertisement is not a sound basis for denying recovery*. Such a rule looks not to the defect in the product which produced the injury, but focuses upon the

question of whether the plaintiff saw an advertisement, which is not relevant to the creation of the risk of harm to the plaintiff.' (218 NE 2d at 192)

We respectfully urge that the Supreme Court refer to the *Lonzrick* decision both in the intermediate Appellate Court (decided before the present case was tried) and in the Ohio Supreme Court. There has been a clear failure by the Court of Appeals to apply the law of Ohio which concededly governs the present case, and under which the petitioner is entitled to the judgment rendered in the trial court.

THERE WAS A FACTUAL ISSUE AS TO NEGLIGENCE ON WHICH PETITIONER IS ENTITLED TO A JURY TRIAL IF THE WARRANTY JUDGMENT IS NOT AFFIRMED

The General Motors brief is devoted largely to an exposition of facts which it believes support the defendant's position (16 out of 23 pages). This elaborate review of fact and contention makes it all the more clear that there was and is a real dispute about the facts and particularly the inferances to be drawn from them as to the negligence of General Motors in the design of the starter system on this bulldozer. See e.g., the concession on p. 7 of respondent's brief that there is a "conflict" in the testimony.

Repeatedly the Respondent goes back to its argument that if the machine would not start in gear there would have been no purpose in having a shield. (Resp. Br. 13, 14-15) This merely begs the question. Since the bulldozer admittedly would start in gear and was therefore dangerous without a shield, the real question is: *Why then should there not have been an EFFECTIVE shield to prevent inadvertant*

starting in gear? A shield which was not effective surely became a trap, and a jury was entitled to say that this was a negligent design.

We respectfully move the Court for the issuance of a Writ of Certiorari to the Court of Appeals for the Fourth Circuit.

WM. CLARENCE KLUTTZ

LEWIS P. HAMLIN, JR.
Wachovia Bank Building
P. O. Box 58
Salisbury, North Carolina 28144
Attorneys for Petitioner
Telephone 636-8800